(29,882)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 572

CENTRAL UNION TRUST COMPANY OF NEW YORK, APPELLANT,

vs.

ANDERSON COUNTY, TEXAS; THE CITY OF PALESTINE, TEXAS; GEORGE A. WRIGHT ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 28, 1924

[fol. 1] **IN UNITED STATES DISTRICT COURT**

No. 189. In Equity

CENTRAL UNION TRUST COMPANY OF NEW YORK

vs.

ANDERSON COUNTY et al.

PRÆCIPE FOR TRANSCRIPT—Filed Sept. 8, 1923

L. C. Masterson, Esq., Clerk of the U. S. District Court for the Southern District of Texas, Houston, Texas.

DEAR SIR: In preparing the transcript of the record in the above case on appeal, please insert the following in the order here named:

1. Caption
2. Bill of the Plaintiff
3. The Subpœnas upon the defendants, showing service.
4. The appearance of the I. & G. N. Ry. Co.
5. The Certificate of Disqualification of Judge Hutcheson
6. The appointment of Judge Estes to sit.
7. The Amendment to the Bill by the Plaintiff
8. Motion to Dismiss.
9. Statement of the evidence introduced on trial and to be furnished you.

9½. Opinion of Judge Estes.

10. Decree dismissing the case.
11. Petition for the allowance of the Appeal.
12. Assignments of Error.
13. Decree allowing the Appeal, etc.
14. Bond on Appeal.
15. Certificate of Judge Estes that only a question of jurisdiction was ruled.
16. Prayer for Reversal.

Yours truly, H. M. Garwood, Sam'l B. Dabney, Solicitors for the Plaintiff, Central Union Trust Company of New York.

We have received a copy of the foregoing Præcipe, accept service thereof and concur therein, with the opinion of Judge Estes added.

Phillips & Townsend, W. C. Campbell, Campbell, Greenwood & Barton, Solicitors for the Defendants Anderson County, the City of Palestine, George A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes. Thomas J. Freeman, Solicitor for International and Great Northern Ry. Co.

[File endorsement omitted.]

[fol. 2] [Caption omitted.]

[fol. 2½] [Title omitted]

[File endorsement omitted.]

[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

No. 49. In Equity

CENTRAL UNION TRUST COMPANY OF NEW YORK, Plaintiff,

vs.

INTERNATIONAL & GREAT NORTHERN RAILWAY et al., Defendants

No. 189. Eq.

CENTRAL UNION TRUST COMPANY OF NEW YORK, Plaintiff,

vs.

ANDERSON COUNTY et al., Defendants

BILL OF COMPLAINT—Filed June 5, 1922

To the Honorable Judges of said Court:

The plaintiff respectfully shows to the court as follows:

First

Plaintiff is a corporation duly organized under the laws of the State of New York, a citizen of and domiciled in that State, in the City of New York, where it has its home office and headquarters, and complains of Anderson County, Texas, the City of Palestine, Texas, Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes, and of the International & Great Northern Railway Company.

[fol. 4] AndersonCounty is, and has been prior to March 1, 1872, a body corporate and politic, created and recognized as a county by the Legislature of the State of Texas, and Charles Robert Stewart is the duly qualified County Judge thereof, and Walter Calhoun Quick the clerk of the County Court thereof, both citizens of Anderson County, Texas, upon whom service of subpœna on account of said county may be made.

The City of Palestine is a municipal corporation, duly incorporated and chartered as a city of over 10,000 inhabitants by special act of the Legislature of Texas, and A. L. Bowers, a citizen of Palestine, Anderson County, Texas, is the Mayor thereof, upon whom

the service of a subpœna may be made on account of the City of Palestine.

The defendants, Wright, Bowers, Hearne, Robinson, Link, Sewell, Colley and Hughes are citizens and residents of Palestine, Anderson County, Texas.

Anderson County is in the Eastern District of Texas.

The defendant Railway is a corporation, incorporated under the laws of the State of Texas domiciled in Houston in Harris County, Texas and a citizen thereof, and is in the Southern District of Texas.

The following abbreviations are used below:

H. & G. N. R. R. for Houston & Great Northern Railroad Company.

I. & G. N. R. R. for International & Great Northern Railroad Company.

I. & G. N. R'y for International & Great Northern Railway Company.

R. S. for the Revised Statutes of Texas of 1911.

Second.

1. The defendants: Anderson County, the City of Palestine, and [fol. 5] Wright, Bowers, Hearne, Robertson, Link, Sewell, Colley and Hughes (these latter claiming to represent themselves and all citizens of Palestine): assert that in 1872 and 1875 contracts were made with the H. & G. N. R. R., subsequently consolidated into the I. & G. N. R. R., and with the I. & G. N. R. R., for the location of the general offices and shops and roundhouses at Palestine, in Anderson County, Texas; and that in 1889 the legislature passed an act, amended in 1899, now R. S. Articles 6423-4-5, and that this statute has incidence because of making of such alleged contracts; and that the I. & G. N. R'y Co., and its successors, acquiring its properties, and using the same as public carriers became bound, not only to perform the alleged contracts of 1872 and 1875, but to maintain general offices and shops and roundhouses at Palestine, all as defined by said statute; because, as claimed, of the alleged making of the alleged contracts in 1872 and 1875; and that this is an obligation inherent in the right to operate the railway properties as a public carrier, and in any franchise or charter thereof, and resting on the property and running with the property as a burden thereon, into whosoever hands it may come, once such alleged contracts of 1872 and 1875 are proved and found to exist. And the defendants other than the I. & G. N. R'y, together with F. W. Ozment, now dead, sued the I. & G. N. R'y, in 1912, in the State Court, and on the 17th of January 1914, in the District Court of Cherokee County, Texas, obtained a decree against it that it shall forever keep and "maintain the general offices, machine shops and roundhouses for the operation" of this Railway, in Palestine, and that it be perpetually enjoined and restrained from keeping or maintaining the general offices of its [fol. 6] executives named (those set out in the statute) at any other place. This decree became final in 1918 and these defendants are insisting thereon as binding upon any purchaser of the property,

and declare that they will enforce it by suit in another forum, and penalties, if not observed by any purchaser under the decree of foreclosure which this court has already entered in the suit of Complainant in Equity No. 49 in this court and these defendants claim that this decree is res judicata against plaintiff and any purchaser under the decree of foreclosure which has been entered herein, in No. 49 in Equity, or which may hereafter be entered by this court, although plaintiff's foreclosed mortgage antedated said suit in the District Court of Cherokee County, and although plaintiff was never made a party to that suit, the defendants having full notice of this mortgage. It is denied that the alleged contracts ever existed or had incidence, or have come down upon the property or bind this plaintiff, or any purchaser under the mortgage for which it has a decree of foreclosure as hereinbelow set out.

2. In August-September, 1911, the I. & G. N. R'y was organized and acquired all of the property under foreclosure sale of the I. & G. N. R. R. into which the H. & G. N. R. R. had been merged, and the I. & G. N. R'y in August-September, 1911, by deed of trust conveyed all of its properties owned, or to be acquired, to the plaintiff, then known as the Central Trust Company of New York, and thereafter to-wit: In August, 1914, the obligations secured by this deed of trust being defaulted upon, the plaintiff brought its bill for a Receivership and foreclosure in this court, making defendant thereto the I. & G. N. R'y, No. 49 in Equity, and on May 17, 1915, this court entered a decree of foreclosure for the recovery of the amount [fol. 7] under said mortgage, and for the sale of all of the properties of the Railway Company; all as appear on the Equity Journal and in the minutes of this court, but no sale has been had, nor has any time of sale been set.

3. On August 10, 1914, on the bill of this plaintiff in said cause in which the decree of foreclosure was entered No. 49 in Equity, James A. Baker and Cecil A. Lyon were appointed Receivers of the railway and all its property, and directed by this court to operate the same, and thereafter Cecil A. Lyon died and James A. Baker was appointed sole Receiver, and as such has continued and is now continuing to operate this property under the direction of this court.

4. It is impossible to maintain such general offices as those defined, and machine shops and roundhouses at Palestine without great losses, and to maintain them there will be to the great detriment and injury of the property and a great burden upon the same. The operation of the property can not be conducted from and at Palestine without incurring these losses, and the claims of defendants, if maintained, will cause a loss of business and a net loss in operating the property of not less than $500,000.00 per annum. Whereby the property is of less value by reason of the assertion of such claims, and if these claims are maintained the property will be of far less value than it would be; and than it will be if such claims are eliminated; and will be diminished in value not less than $3,000,000.00,

and the title and value of the property is clouded and burdened by the claims of the defendants.

5. This bill is brought in aid of the suit of plaintiff, No. 49 in Equity, and in aid of the decree of foreclosure, entered of date May 17, 1915, and for the benefit of the plaintiff and its trust, and the benefit of any purchaser or purchasers under the decree of fore- [fol. 8] closure, or any other decree, which may be made by this court, and for the purpose of eliminating the claims of Palestine and Anderson County and the citizens thereof, and for the purpose of determining whether or not such claims exist in Law or Equity. Plaintiff denies that they exist. And all of these matters will be more particularly set out below in the statement of the ultimate facts upon which the plaintiff asks relief.

6. The plaintiff is a resident and citizen of the State of New York, incorporated under and by its laws, and domiciled in New York City therein. The defendants are all residents and citizens of the State of Texas. This is a civil suit in the nature of a suit in equity.

7. Wherefore, The matter in controversy exceeds, exclusive of interest and costs the sum or value of $5,000, and involves a controversy between citizens of different states; but is dependent and involved in this dependent bill, dependent on No. 49 in Equity herein, and to be pursued in this court. The plaintiff assigns all of the above as grounds of jurisdiction of this court, and respectfully represents that not only has this court jurisdiction of this case, but that also it is the only court having jurisdiction hereof.

Third

I

1. The I. & G. N. R'y Co. is made a party to this proceeding, being a party to the foreclosure proceeding, Equity No. 49, and all of the relief asked against the other defendants is also asked for against it.

2. The other defendants, Anderson County and the City of Palestine, and Geo. A. Wright and the other citizens of Palestine, claim as follows:

(a) That Anderson County is, and has been since prior to the 1st [fol. 9] day of March, 1872, a body corporate and politic, created and organized as a county by the Legislature of the State of Texas.

(b) That the City of Palestine is a municipal corporation, duly incorporated and chartered as a city of over ten thousand inhabitants by special act of the Legislature of Texas, approved on the 19th day of March, 1909, and is the successor of the City of Palestine, duly incorporated under the laws of Texas as a municipal corporation, since prior to the 1st day of March, 1872.

(c) That the defendant I. & G. N. R'y Co. is a corporation, organized under the laws of Texas as hereinafter shown, and required by law to keep and maintain its general offices at the City of Palestine, in the County of Anderson, Texas.

(d) That on the 22nd day of October, 1866, the Legislature of Texas, by an act entitled "An Act to incorporate the H. & G. N. R. R. Co.," created and chartered that company, and authorized it to construct, own, maintain and operate a railroad, commencing at the City of Houston and running northward to Red River. That said act authorized said company to form a junction and connection with any other road in such manner as would best secure their construction.

(e) That on the 5th day of August, 1870, the Legislature of Texas, by an act entitled "An Act to incorporate the International Railroad Company, and provide for the aid of the State of Texas in construction of same" created and chartered that company, and authorized it to construct, own, maintain and operate a railroad from such point on Red River as nearly opposite to the town of Fulton, in the State of Arkansas, as might be found expedient in forming a junction with the railway known as the "C. & F. R'y," then [fol. 10] being constructed, by the most practicable route across the State of Texas, by way of Austin and San Antonio, to the Rio Grande River, at such point at or near Laredo as might be selected by the company. That said act authorized the International Railroad Company to connect itself with any other railroad company, within or without the State, and to operate and maintain its railroad in connection or in consolidation with any other railroad company, as it might deem best; and said act provided that the principal office of said company should be established at such point on the line of said railroad as might be deemed most convenient for the transaction of its business, and might be moved from time to time to such places on the line as the progress of the work of construction might render expedient or necessary.

(f) That, acting under said act of August 5th, 1870, the International Railroad Company had, prior to the 15th day of March, 1872, constructed a portion of its line of railroad from, at or near the town of Hearne, in Robertson County, Texas, to the City of Palestine, in Anderson County, Texas, and was regularly operating said line of railroad, as a common carrier of freight and passengers for hire, and was maintaining a depot at said City of Palestine.

(g) That heretofore, to-wit, on or about the 15th day of March, 1872, the H. & G. N. R. R. Co. had constructed, or had determined to construct, under its *its* charter, its line of railroad from the City of Houston northward to the north boundary line of Houston County, Texas, and on or about said date, said H. & G. N. R. R. Co., acting by its duly authorized president, Galusha A. Grow, contracted and [fol. 11] agreed, in Anderson County, Texas, with the citizens of the City of Palestine, Texas, acting by and through Judge John H. Rea-

gan, to extend its said line of railroad from the north boundary line of Houston County, to intersect the line of the International Railroad Company at Palestine, and to establish a depot within one-half mile of the court house at Palestine, and to commence running cars regularly thereto by the first day of July, 1873, and to thereupon locate and establish, and forever thereafter keep and maintain the general offices, machine shops and roundhouses of the H. & G. N. R. R. at the City of Palestine, for and in consideration of the promise and agreement then made, upon the part of the said Judge John H. Reagan, to make a thorough canvass of Anderson County, to induce the electors thereof to authorize, by their votes, the issuance of the interest bearing bonds of said county in the principal sum of $150,000, and, for and upon the further consideration that Anderson County, on authorization of its electors, in the manner prescribed by law, should issue and deliver to the H. & G. N. R. R. Co. its interest bearing bonds in said principal sum of $150,000, upon the completion of said railroad to its intersection with the International Railroad at Palestine, and upon the establishment of a depot within a half mile of the court house, and upon the commencement of the running of cars regularly to such depot.

(h) That if said contract did not expressly name the citizens of Palestine as parties thereto (as defendants aver it did), yet the same was made for their benefit and in their behalf, and such citizens, at that time and throughout the future, including the defendants, were the parties intended, by both Judge John H. Reagan and the H. & G. N. R. R. Co., as the parties to be benefited by the performance of [fol. 12] all the obligations of the railroad company under said contract, and especially of those obligations which relate the location and maintenance of general offices, machine shops and roundhouses at Palestine. This alleged contract is claimed to have been in parol at a livery stable in Palestine, and is designated as the alleged livery stable contract.

(i) That the above mentioned contract, and especially the promise to establish and forever maintain said general offices, machine shops and round houses at Palestine, was made and entered by the H. & G. N. R. R. Co. as an inducement to Anderson County and the electors thereof to donate to said H. & G. N. R. R. Co. the bonds of said county in the principal sum of $150,000, and it was in reliance upon, and in consideration of, such inducement, contract and promise that said bonds were subsequently authorized and delivered to said railroad company.

(j) That in order to induce the electors of Anderson County to authorize the issuance and delivery to the H. & G. N. R. R. Co. of the interest bearing bonds of Anderson County, in the principal sum of one hundred fifty thousand dollars, which bonds are hereinafter more fully described, the H. & G. N. R. R. Co., acting by its duly authorized president, Galusha A. Grow, and by other duly authorized agent, on or about the 15th day of March, 1872, and on or

about the last days of April, 1872, and on or about the first days of May, 1872, and throughout the time from about the 15th day of March, 1872, to the 4th day of May, 1872, promised, agreed, and represented, unto and with Anderson County, and the electors thereof, that the general offices, machine shops and round houses of the H. & G. N. R. R., upon the completion of said railroad to [fol. 13] Palestine, would be established and forever thereafter maintained at Palestine, in Anderson County, Texas, and further, that said company was firmly bound by valid contract, with the citizens of Palestine, to so establish and maintain general offices, machine shops and round houses.

(k) That said contract, promises, agreements and representations were deliberately authorized and made by the H. & G. N. R. R. Co., with the intention that the electors of Anderson County, should act and rely upon same. That the electors of Anderson County were induced, by said contract, promises, agreements and representations, to authorize, and therefore did authorize, by their votes, at an election held in said County on the 1st, 2nd, 3rd and 4th days of May, 1872, the issuance and delivery to the H. & G. N. R. R. Co. of the interest bearing bonds of Anderson County, for the principal sum of One Hundred and Fifty Thousand Dollars ($150,000), payable in twenty years from their date, with interest at the rate of eight per cent per annum from their date, as per coupons to be attached, the interest and two per cent of the principal to be paid on the first day of January of each year, said bonds to be issued and delivered upon the completion of said railroad to an intersection with the International Railroad at Palestine, and upon the establishment of a depot within a half mile of the court house at Palestine, and upon the commencement of the regular running of cars by said company to such depot. That said electors would not have authorized the issuance and delivery of said bonds, nor the offer of same to the H. & G. N. R. R. Co., but for the inducement of the above mentioned contract, promises, agreements and representations, by the company, that it would establish and forever maintain general offices, machine [fol. 14] shops and round houses at Palestine, and that it was under a binding contract with the citizens of Palestine so to do, nor but for the fact that the electors relied and acted upon such contract, promises, agreements and representations.

(l) That the said Judge John H. Reagan made a thorough canvass of Anderson County between about the 15th day of March, 1872, and the 4th day of May, 1872, to induce the electors of Anderson County to vote to authorize the issuance of said bonds, in strict conformity with his promise to, and agreement with, the H. & G. N. R. R. Co. and its president, as hereinbefore alleged.

(m) That said election was held under and by virtue of a proper order of the Commissioners' Court of Anderson County, Texas, and subsequently on the 6th day of May, 1872, an order was entered in said court declaring that more than two-thirds of the qualified voters of Anderson County had voted in favor of the issuance of said bonds.

(n) That prior to the 31st day of December, 1872, the H. & G. N. R. R. Co. completed its railroad from the north boundary of Houston County to its intersection with the International Railroad at Palestine, and built a depot within one-half mile of the court house at Palestine, and commenced to run its cars regularly thereto, and thereafter, on or about the 29th day of January, 1873, said company, by its president, Galusha A. Grow, applied to the Commissioners' Court of Anderson County for the interest bearing bonds of said county in the principal sum of $150,000, as hereinbefore described and as authorized by the electors of said county; and in order to induce the Commissioners' Court of Anderson County to issue and [fol. 15] deliver said bonds, the said H. & G. N. R. R. Co., acting by its duly authorized president, Galusha A. Grow, again promised, agreed and represented unto said county and said Commissioners' Court that the company had already begun to establish and would thereafter forever maintain its general offices, machine shops and round houses at Palestine, as required by its contract with the citizens of Palestine; and, acting on said promise, agreement and representation, and relying on same, as well as on the previous contract, promises, agreements and representations of said company, as hereinbefore set out, and in part performance of said contract between the H. & G. N. R. R. Co. and the citizens of Anderson County, the said Commissioners' Court was induced to issue and deliver, and on or about the 29th day of January, 1873, did issue and deliver unto the H. & G. N. R. R. Co. the interest bearing bonds of Anderson County, as theretofore authorized by the electors, bearing date as of December 31st, 1872, for the principal sum of $150,000, in denominations of $500 each, payable in twenty years from their date, with interest from their date at the rate of eight per cent per annum, as per coupons attached, the interest and two per cent of the principal payable on the 1st day of January of each year, commencing January 1st, 1874.

(o) That if the president of the H. & G. N. R. R. Co. and the other agents of said company were not expressly authorized by it to make the contracts, promises, agreements and representations hereinbefore alleged, yet the said H. & G. N. R. R. Co. was nevertheless bound thereby; that the said H. & G. N. R. R. Co., with full knowledge of the facts hereinbefore plead, acquiesced in, approved and ratified each and all of the aforesaid contracts, promises, agreements [fol. 16] and representations of its said president, and of its other agents, with the intention to adopt same and to be bound thereby, and, with such knowledge, obtained and accepted the services of Judge John H. Reagan, as above shown, and obtained, accepted and retained the above mentioned bonds of Anderson County, as well as the proceeds theerof, and this plaintiffs are ready to verify.

(p) That about February 19, 1872, the Presidents of the International and H. & G. N. Railroads agreed upon their consolidations, which was approved by the respective stockholders in September, 1872, and ratified by the legislature of Texas on the 24th of April, 1874, and the 10th of March, 1875.

(q) That heretofore, to-wit: On or about the first of the year 1875, the I. & G. N. R. R. Co., acting by its duly authorized general manager, or general superintendent, H. M. Hoxie, contracted and agreed with the citizens of the City of Palestine, Texas, among whom were Geo. A. Wright and J. W. Ozment, to fully and completely perform the promises, contracts and agreements of the H. & G. N. R. R. Co., or the promises, contracts and agreements which the said Galusha A. Grow had undertaken to make in behalf of said Company with said citizens and with Anderson County and with the electors of said county, by at once locating the general offices of the I. & G. N. R. R. at Palestine, and by thereafter forever keeping and maintaining the general offices, machine shops and round houses of said I. & G. N. R. R. at Palestine, for and in consideration of the bonds theretofore issued by Anderson County to the H. & G. N. R. R. Co., and for the further additional consideration that said citizens should at once construct and complete, or cause to be constructed and completed, at [fol. 17] their own cost and expense, any and all houses, at Palestine, Texas, which might be demanded by the I. & G. N. R. R. Co., in accordance with such plans or specifications or directions as might be furnished by the company, through its officers, for occupancy, at reasonable rentals, by employees of said company and their families, and especially by general officers of said company, their families, and clerks, and is designated as the alleged rent houses contract."

(r) That the citizens of Palestine, as required by said contract and agreement, did at once, in the early part of the year 1875, construct and complete, and cause to be constructed and completed, at their own cost and expense, amounting to many thousands of dollars, each and all of the houses, at Palestine, Texas, which were demanded by the I. & G. N. R. R. Co., and by its officers, numbering more than twenty, in accordance with the plans and directions furnished by the company and its officers, for occupancy, at reasonable rentals, by the employees of said company and their families and clerks, to the entire satisfaction of the I. & G. N. R. R. Co.; and, that among the houses so constructed and completed by said citizens, were the following, to wit: a residence constructed and completed on Lot 15, of Larkin & Campbell's Addition to the City of Palestine, Texas, by the Palestine Land and Building Company, a corporation organized under the laws of Texas, with its place of business at Palestine, Texas, with its capital stock owned by many citizens of Palestine; a residence constructed and completed by remodeling and reconstructing the former Reeves home, on Lot 14, of Larkin & Campbell's Addition to the City of Palestine, Texas, by said Palestine Land and Building Company; three residences on Lot 4 of Larkin & Campbell's Addition [fol. 18] to Palestine, Texas, by said Palestine Land and Building Company; a residence on Lot 2, in Block 11, of the City of Palestine, by said J. W. Ozment; a resident on part of Block 89 of the City of Palestine, Texas, by Geo. A. Wright and J. E. Whiteselle, who were both citizens of said city; that owing to the lapse of nearly thirty-nine years these defendants are unable to state with any greater

particularity the location of other houses and by whom constructed, under the terms of said contract, but they aver that said railroad company accepted the buildings which were constructed, and the work which was done and caused to be done by said citizens as in full and complete and perfect performance of said contract, as in truth and in fact such buildings and work did fully and completely comply with every obligation of said citizens under said contract; and thereupon the said I. & G. N. R. R. Co. became bound, by its aforesaid contract and agreement (as well as by the previous contract and agreement of one of its constituents), to forever keep and maintain the general offices, machine shops and round houses of the I. & G. N. R. R. at Palestine.

(s) That if the general manager or general superintendent of the I. & G. N. R. R. Co., H. M. Hoxie, was not expressly authorized by said company, to make the contract and agreement hereinbefore set out, which he did make, in behalf of said company with the citizens of Palestine, yet the I. & G. N. R. R. Co. was nevertheless bound thereby; that said company, with full knowledge of said contract and agreement, acquiesced in, approved and ratified same, with the intention to adopt it and be bound thereby, and, with full knowledge, said company accepted the benefits of the expenditures made [fol. 19] by the citizens of Palestine in the construction of houses for its employees as above shown; and, in performance of its obligations under said contract and agreement, the I. & G. N. R. R. Co. did immediately, and in the early part of the year 1875, locate and establish the general offices of the I. & G. N. R. R. Co. at Palestine, and did thereafter continuously maintain such general offices at Palestine, until the 1st day of September, 1911; and, in compliance with the aforesaid contract and agreement, the I. & G. N. R. R. Co. and the I. & G. N. R'y Co. have continuously maintained the machine shops and round houses of the I. & G. N. R. R. Co. at Palestine from the date of said contract and agreement to the present time.

(t) That under the laws of Texas, the I. & G. N. R. R. had, prior to the 9th day of May, 1911, owned 1106 miles of railroad, upon which rested the first mortgage of 1879 and certain other liens, and the mortgage of 1881, which had been foreclosed in the Federal Court; and that the railroad was sold out and bought in by one Nicodemus, and the sale approved by the court, and that Nicodemus, with certain associates, had taken out a charter under the name of the I. & G. N. R'y Co. for the purpose of acquiring and operating this property, and that Nicodemus complied with his bid, and under the order of the court conveyed all of the property to the I. & G. N. R'y, the I. & G. N. R. R. joining in the conveyance to the railway company.

(u) That because of the alleged contract of the H. & G. N. R. R. and of the alleged contract of the I. & G. N. R. R., and of the claims made above, and because as alleged no certain place was named in the charter of the I. & G. N. R. R. where its general offices should be

located and maintained, the laws of Texas, on the 1st of September, 1911, and continuously afterwards to the present time, impose and [fol. 20] do now impose, upon the I. & G. N. R'y and upon any purchaser or purchasers acquiring the property through foreclosure or otherwise, the performance thereof: a public and statutory duty, inuring to the defendants' special benefit, to keep and maintain the general offices, machine shops and round houses of the I. & G. N. R'y at the city of Palestine in Anderson County, and that the State of Texas, by general law, expressly forbade and still forbids and prohibits any change from the said city, of the location of any general offices, machine shops and round houses; and that the I. & G. N. R. R., prior to the sale of its railroad and other property, was not only bound by contract, but was bound by general law, part of its duty to the public, coupled with its corporate franchises, to keep and maintain the general offices, machine shops and round houses of said railroad at the City of Palestine; and that such duty and regulation of its franchises could not be and was not impaired nor discharged by the sale, or any future sales, of said railroad, with its operating property and franchises; and that the sale of the property under the decree of foreclosure, already entered in this court, will not relieve the property of the obligations of the alleged contracts, or of the alleged general law as a part of its duty to the public.

(v) That within the definition of general offices are included: The Vice-President and General Manager, Secretary, Treasurer, Auditor, General Freight Agent, Traffic Manager, General Superintendent, General Passenger and Ticket Agent, Chief Engineer, Master of Transportation, Fuel Agent, General Claim Agent, Superintendent of Motive Power and Machinery, and Master Mechanic; and that within the term of machine shops and round houses are included the [fol. 21] machine shops and round houses for the operation of the I. & G. N. R'y, to be kept in the City of Palestine, in the County of Anderson, where as claimed the H. & G. N. R. R. and the I. & G. N. R. R. have contracted and agreed to forever keep the same for valuable considerations received.

(w) That while the alleged contracts of 1872 and 1875 were undefined, and at most did not have the extent of the statute, R. S. 6423-4-5, yet that the existence of these alleged contracts as incidents has brought into force the long subsequent statute under the police powers of the State, and that the statute remains in full force and effect, defining itself, and must be obeyed, whatever the terms and however different the alleged contracts of 1872-1875; and that said statute runs through all foreclosures and mortgages anterior or subsequent to it, and forever remains in full force and effect as an exercise of the police power of the State of Texas, once the alleged contracts of 1872 and 1875 are proved, whatever their terms; and that the decree of the District Court of Cherokee County, Texas, described in the second head hereof above, will forever live and remain in force. The alleged contracts of 1872 and 1875 are claimed to have been in parol.

II.

1. The plaintiff represents that the above claims give no grounds of right whatever, and that neither the plaintiff nor anyone claiming under it, nor any purchaser at or under foreclosure of its mortgage of 1911 foreclosed by this court May, 1915, or any other decree of this court, would be bound in any way by said claims and proceedings, and that R. S. 6423-4-5 has no application, as to them; [fol. 22] and alleges that there were no such undertakings, or alleged contracts, and denies all of said claims and says that they are untrue.

2. The plaintiff denies all of the claims of said defendants and says that they are untrue, and that the alleged contracts of 1872 and 1875 were never made, and never authorized by the directors or stockholders of either the H. & G. N. R. R. or I. & G. N. R. R.; and alleges that whenever the general offices or shops and round houses may have been at Palestine in the past, then that they were placed there not because of the existence of any such contracts or alleged obligations, but because the railroad saw fit to place them there.

3. The plaintiff further represents as follows:

(a) Further pleading, subject to all of the positions taken above, and preserving the same: It does not admit that any such alleged contracts as are set out were ever made, and denies that they were made; but further represents that if any such agreements or contracts were ever made either with Reagan or with Hoxie and were ever ratified, as alleged, then that for more than two years after the making and the ratification of the same (they being verbal and not in writing) they were breached and broken by the I. & G. N. R. R. Co., its agents and employees, by which breach and break of these alleged contracts, if they ever existed (which is not admitted but denied), and then by and upon such breach and break they became actionable, and that all of this happened and said cause of action arose more than two years and more than four years before the institution of this suit and more than two years and more than four years before the I. & G. N. R. R. Co. was sold out.

(b) Further pleading, subject to all the positions taken above, [fol. 23] and preserving the same, the Plaintiff represents: It does not admit that any such alleged contracts as are set out were ever made, and denies that they were made; but further represents that if any such agreement or contract as is alleged to have been made with Judge Reagan, representing the citizens of Palestine, was ever made, then such contract was breached and broken by the H. & G. N. R. R. Co., its agents and employees and officers in this: The H. & G. N. R. R. Co. did not move its general offices and headquarters to Palestine and maintain and place its shops there, and round houses there, but more than two years elapsed after the making of said alleged contract and after the time had arrived for the performance thereof, before the I. & G. N. R. R. Co. moved to Palestine and established its headquarters and general offices and

shops and round houses there, and during such two years and more than two years, the general offices were maintained at Houston, Texas, in defiance of and in breach of said contract, if it ever existed, whereby such contract was breached and broken if ever made, for more than two years before the institution of this suit.

(e) In the year 1881 all of the officers and employees of the I. & G. N. Railroad Company were moved by it from Palestine, Texas, except its station and local offices there, and all of the employees and general officers and all of the officers and employees belonging to the general offices mentioned as far as existing were moved by the I. & G. N. R. R. Co., now sold out, to the City of St. Louis, in the State of Missouri, in breach of the alleged contracts plead by the plaintiffs; and that all of such general officers and their offices, and the officers and employees mentioned as far as [fol. 24] existing, continued to reside and remain in the City of St. Louis, State of Missouri, in contradiction of the alleged contracts and agreements, from in the year 1881 into the year 1888, whereby such contracts and agreements, if they existed, and if there was any action thereon, were breached and broken; and whereby, if any cause of action existed, a cause of action arose upon such breach and break, which took place in the year 1881, and that there has never been any waiver of the statute of limitation by said railroad, or by anyone, in writing or otherwise, or waiver thereof, either of the two years' statute or of any four years' statute.

(d) Wherefore it appears that, even if these alleged contracts of 1872 and 1875 ever existed, yet they were barred before 1889, wherefore, neither they nor the statute of 1889 (R. S. 6423-4-5) could now come into effect, and the bar of the statutes is now plead and interposed.

(e) Further, preserving all of its positions taken above, and insisting upon the same and subject to the same, the plaintiff specially pleads as follows: The alleged contracts sued on were neither of them and none of them in writing, and the performance was incapable of being completed within the time prescribed by law, upon both sides or upon either side; nor was there any contingency upon such contracts by which there was a possibility of the performance being released or completed by either side within a year. Wherefore, the plaintiff pleads the statute of frauds in bar, and because such alleged contracts were not reduced to writing.

(f) By the Act of September 1, 1856, the Legislature of Texas constituted a corporation, designated as the "Houston Tap and Brazoria Railway Company," with the right of locating, building, etc., [fol. 25] a railroad from the City of Houston to the Brazos River, and constituting such railroad a public carrier. The general offices and shops were located in the City of Houston in Harris County.

(g) The Houston Tap and Brazoria Railway Company was constructed to the Brazos River under this charter, and falling in debt to the State of Texas on account of money lent from the school

fund, it was provided by the act of the Legislature of August 15th, 1870, that the road should be sold. This was entitled "An Act to provide for the sale of the Houston Tap & Brazoria Railway," and under this act the road was duly sold and afterwards purchased by the H. & G. N. R'y Co. with all its properties and franchises.

The act incorporating the Houston Tap and Brazoria Railway Company was entitled "An Act to incorporate the Houston Tap and Brazoria Railway Company."

(h) The H. & G. N. R. R. was incorporated by an act entitled "An Act to incorporate the Houston & Great Northern Railroad Company," by the Legislature of Texas, October 22nd, 1866.

(i) In pleading special portions of the acts plead anywhere herein it is not intended not to plead to refer to the whole of them, but they are all plead by their respective titles, and so of all acts incorporating railroads or consolidating them.

(j) In Section 2 of said act, it was provided: "A majority of the Directors shall constitute a quorum to do business and shall have the power of a full board, and all conveyances and contracts in writing signed by the President and countersigned by the Secretary, or any other officer duly authorized by the Board of Directors [fol. 26] under the seal of the company, when the same is in execution of an order of the board, shall be binding and valid."

By Section 6 of the act the company was authorized to construct a railroad from the City of Houston northward to Red River.

By Section 11 of said act it was provided: "That said company shall have the right to form a junction with any other railroad at any point between Houston and Clarksville, or at either of its termini."

By Section 13 of the act it was provided: "The annual meeting of the stockholders of this company shall be held at the principal office in the City of Houston on the first Monday of December of each year, which shall be a day for the transaction of business by the stockholders, at which time the annual election of directors shall take place," and thereby the general offices were located in the City of Houston.

The principal office of the H. & G. N. R. R. was established, in accordance with the provisions of its charter, in the City of Houston, Harris County, Texas, where was the domicile of the corporation.

The control and execution of contracts, under the provisions of the charter and the provisions of the by-laws of this railroad, and of the I. & G. N. R. R., were and continued to be lodged with the Board of Directors, which alone had the power to make contracts.

(k) On November 13, 1866, the Legislature of Texas passed an act entitled "An Act to incorporate the Victoria & Columbia Railway Company," but no railroad was ever constructed under this act.

(l) The Huntsville Branch Railway Company was incorporated [fol. 27] by the Legislature of Texas, April 4th, 1871, by an act entitled "An Act to incorporate the Huntsville Branch Railway Com-

pany," for the purpose of constructing a railroad from a convenient point on the H. & G. N. R. R. to the town of Huntsville, in Walker County, Texas.

(m) On May 8th, 1873, the Legislature of Texas passed an act entitled "An Act to consolidate the Houston Tap & Brazoria Railway, the Huntsville Branch Railway and the Victoria & Columbia Railroad with the Houston & Great Northern Railroad," whereby it was declared that all of said railroads, except the H. & G. N. R. R., were "made and declared to be to all intents and purposes in law a part of the H. & G. N. R. R., and shall be under the control and management of the said H. & G. N. R. R. in like manner, as every other part of their railroad; and all rights, privileges and franchises granted or secured in the charter of either or all of the aforesaid corporations, shall inure to and be exercised and enjoyed by the said Houston & Great Northern Railroad Company as fully and to the same intent as they could have been by either of said companies."

(n) The International Railroad was chartered August 5th, 1870, by the act of the Legislature of Texas, which act was entitled: "An Act to incorporate the International Railroad Company and to provide for the aid of the State of Texas in constructing same."

By Section 2 of the act this road was authorized to build and operate a railway and telegraph line from a point on Red River across the State of Texas by Austin and San Antonio to the Rio Grande, at or near Laredo, and otherwise as in the act provided.

By Section 14 of the act it was provided: "Said company shall [fol. 28] have the right to connect itself with any other railroad within or without the State; and, under such terms as to it shall seem best, to operate and maintain its said railroad in connection or consolidation with any other such railroad company."

By Section 7 of the act it was provided that "The immediate control and direction of the affairs of said company shall be vested in a Board of not less than five Directors."

By Section 8 of the act it was provided: "The principal office of said company shall be established at such point on the line of said railway as may be deemed most convenient for the transaction of its business, and may be moved, from time to time, to such places on said line as the progress of the work of construction may render expedient and necessary."

(o) In the years 1872, 1873 and 1874, by agreements of the Board of Directors and of the stockholders, the International Railroad and the H. & G. N. R. R. were consolidated.

By the Act of April 24th, 1874, entitled, "An Act to authorize the International & Great Northern Railroad Company to issue bonds," the existence of the consolidation was recognized, and the consolidated road authorized to issue bonds and borrow money and execute a mortgage and convert the bonds of the International Railroad or of the H. & G. N. into the stock of the I. & G. N. R. R.

By the Act of March 10th, 1875, of the Legislature of Texas, en-

titled: "An Act for the relief of the International Railroad Company, now consolidated with the Houston & Great Northern Railroad Company under the name of the International & Great North-
[fol. 29] ern Railroad Company," it was recited that the two roads had been consolidated under the name of the I. & G. N. R. R. Co., and provision was made for a settlement of certain matters between the State and the International Railroad, and the issue of land certificates.

By reason of the above legislative charters and acts of the respective corporations and the legislation, the I. & G. N. R. R., now sold out, was formed, there never having been issued to it after consolidation a new charter.

(p) After the formation of the I. & G. N. R. R., various additions and extensions of trackage were made to the properties.

(q) The International Railroad Company commenced the construction of its road and had its headquarters at Hearne, Texas, where they remained until the consolidation with the H. & G. N. and until they were moved to Houston, Texas.

On moving the headquarters and general offices of the International Company to Houston, Texas, they were consolidated at Houston, Texas, in Harris County, with the general offices and headquarters and domicile of the H. & G. N. R. R., where the domicile of that railroad was.

The headquarters and general offices of the consolidated I. & G. N. R. R. remained at Houston, Texas, the headquarters of the company, and where it was provided the domicile and principal office of the H. & G. N. R. R. Co. should be.

The headquarters and general offices of the I. & G. N. R. R. remained at Houston, Texas, until in June, 1875, when by the resolution of the Board of Directors, without any reference to the alleged [fol. 30] contracts, which did not exist, herein dealt with, they were moved to Palestine, Texas, and the executive offices were moved to St. Louis Mo., in the year 1881, and removed back to Palestine in the year 1888.

(r) By the by-laws of the H. & G. N. R. R. and the International Railroad Company and by the by-laws of the I. & G. N. R. R., as well as by the laws of the State, the control of the respective corporations and of the consolidated corporation was lodged in the respective Boards of Directors or stockholders, by which all contracts had to be approved, in order to become the contracts of the roads, and this was also provided for in the charters of the constituent companies; whereby the control and the power to make contracts was lodged in such Board or Boards, or stockholders. The alleged contracts of 1872 and 1875 were never submitted to the Board or Boards or stockholders, and were never approved or acquiesced in by them.

(s) On or about the 1st of April, 1871, the International Railroad Company duly executed a deed of trust to John A. Stewart and William H. Osborne as Trustees, which was duly recorded in the several counties of the State of Texas and in Anderson County.

This mortgage was executed for the purpose of securing certain bonds.

Default being made on said bonds, they were sued on in the United States Circuit Court for the Western District of Texas, at Austin, in Equity Case No. 138, in which suit the Trustees, Stewart and Osborne, were complainants, and the International Railroad Company, the I. & G. N. R. R., John S. Bonds and Thomas W. Pearsall, Trustees, etc., Moses Taylor and William Dodge, Trustees, etc., were [fol. 31] defendants; and in this suit it was decreed that there was due the complainants and the holders of the bonds or coupons of the International Railroad Company and its successor, the I. & G. N. R. R., on the 1st of April, 1879, $5,457,678.20 in gold, and that the International Railroad and the I. & G. N. R. R. were severally chargeable with the whole amount, and that the complainants were entitled to collect from these companies and from the mortgaged properties, directed to be sold, this amount, together with the charges, expenses, costs and allowances in the decree provided for. Provision was made for the sale of the property under the direction of Burr G. Duval, the Master, and that it should be sold in one parcel and conveyance made as in the decree provided. This decree foreclosed the lien and mortgage as ascertained and stated in the decree, upon the International Railroad Company's railway and all of its properties as in the decree set out, together with all the corporate rights, privileges and franchises of said railroad, including the franchise to be a corporation, which the International Railroad possessed on the 1st day of April, 1871, or which it afterwards acquired and which was necessarily material and useful in connection with the ownership, use and operation of the said railway.

As directed by the decree, Duval, the Master, made sale of the properties included in the mortgage foreclosed and as ascertained and settled by the decree, for a consideration of $500,000, more or less, to John S. Kenedy and Samuel Sloan as Trustees, and to the survivor of them in fee simple absolute.

The sale being reported by the Master, the court on the 4th of August, 1879, confirmed the sale and directed the Master, upon the [fol. 32] payment to him of the balance due of the bid, to convey the property sold to Kenedy and Sloan, Trustees, by a conveyance vesting said properties, including the chartered powers and privileges of the International Railroad Company, and of the I. & G. N. R. R. with all the powers, rights, franchises, privileges and benefits of the International Railroad Company and of the I. & G. N. R. R.

On or about the 14th of October, 1879, the Master, in pursuance of the order of sale and the decree of foreclosure, conveyed to Kenedy and Sloan all of the property sold, and the corporate rights, privileges and franchises and chartered powers of both roads, and delivered the deed to Kenedy and Sloan.

(t) On the 15th of January, 1874, the International Railroad Company duly executed a deed of trust to John S. Barnes and Thomas W. Pearsall securing the indebtedness next below stated as ascertained and settled in the decree of foreclosure of such mort-

gage, and also on the 15th of January, 1874, the H. & G. N. R. R. duly executed a mortgage to the said Barnes and Pearsall as Trustees to secure an indebtedness as in the decree next below stated, and these mortgages mortgaged the property which is described and ascertained and stated in the decree of foreclosure.

Default being made on the bonds secured by these mortgages, Barnes and Pearsall, as Trustees, sued the I. & G. N. R. R. in the United States Circuit Court for the Western District of Texas at Austin, in Equity No. 132, on the docket of that court, and the case proceeded to foreclosure of the above mortgages on August 4, 1879. The court entered its decree for certain amounts and for foreclosure, wherein it was decreed that the mortgages above men- [fol. 33] tioned were valid; that the I. & G. N. R. R. was the successor of both mortgagors and had assumed their obligations; and that there was due to the complainants on said mortgages $8,297,226.93; that by the mortgage of the International Railroad mentioned, all of its railway was covered and properties as in the decree stated, including all corporate rights, privileges and franchises of that company, whether then held or thereafter acquired; and that by the mortgage executed by the H. & G. N. R. R. there was mortgaged all of that company's railway built or to be built, and as in the decree described, and all of its franchises and rights; and that all of the property mortgaged should be sold.

Acting under the foregoing decree, the Master, Duval, sold the above described properties to John S. Kenedy and Samuel Sloan, Trustees, and made a report on his sale to the court, which thereupon, on the 14th day of August, 1879, confirmed the sale and directed the Master to convey to the said Kenedy and Sloan all the property so sold, vesting in them title thereto and the true ownership of said roads, with all the powers, rights, privileges, franchises and benefits of the International Railroad Company, of the H. & G. N. R. R., and of the I. & G. N. R. R.

In pursuance of this decree of approval, the Master executed a deed to Kenedy and Sloan, Trustees, the purchasers, whereby he conveyed to them all *all* of said properties so sold, and to the survivor of them, as Trustees.

(u) On or about the — day of ——, the H. & G. N. R. R. Co., and not later than the month of February, 1873, duly executed a deed of trust conveying all of its properties and franchises to Moses Taylor and W. E. Dodge to secure a bond issue.

[fol. 34] The bond issue being defaulted on, Taylor and Dodge, Trustees, as complainants, sued the H. & G. N. R. R. and the I. & G. N. R. R., John A. Stewart and William H. Ozman, Trustees, etc., Hayes Receiver, and Barnes and Pearsall, Trustees, in Equity Cause No. 137, in the United States Circuit Court for the Western District of Texas at Austin; and on April 15, 1879, that court entered its decree for the recovery of money and foreclosure, wherein it was decreed that the I. & G. N. R. R. was the successor and assignee of the H. & G. N. R. R. Company and had assumed its obligations; and that on April 1, 1879, there was unpaid on said bonds $5,404,827.75;

that the mortgage was duly executed and that by its terms the H. & G. N. had mortgaged all of the company's railway, built or to be built, together with all of its franchises and rights, and all of its property, except certain lands, and all as in the decree more fully set out; and that both the H. & G. N. R. R. and its successor, the I. & G. N. R. R., had defaulted, and that there should be a foreclosure, which was decreed; and that the property should be sold by Duval as Special Master on the terms stated in the decree.

Acting under the decree, Duval made sale of the properties and reported the same, and the court, on August 4, 1879, confirmed the sale to Kenedy and Sloan as Trustees, for $500,000 in gold and directed the Master to convey to the said Kenedy and Sloan, as Trustees, upon their making complete payment the roadbed, tracks, franchises and chartered powers and privileges of the H. & G. N. R. R. and I. & G. N. R. R.; and the powers, rights, privileges and franchises and properties as in the decree of foreclosure, and the decree of approval, or either, stated.

[fol. 35] Acting in accordance with this decree, the Master, by deed dated the 14th of October, 1879, conveyed to Kenedy and Sloan, Trustees, all and singular the railway of the H. & G. N., built and to be built, its franchises and rights, and other properties as in the deed described, including the franchises and chartered privileges of the H. & G. N. R. R. and of the I. & G. N. R. R., succeeding to the title of the H. & G. N. R. R. granted them by virtue of their charters or by any other laws of the State of Texas; Kenedy and Sloan having made complete payment.

(v) The receiverships or receivership involved in the above mentioned suits, upon which the sales resulted in 1879, were all wound up and discontinued; and the considerations prescribed in the decrees were all paid and accepted by the court.

(w) On or about November 1, 1879, Kenedy and Sloan, Trustees, executed and delivered a deed to the I. & G. N. R. R. conveying a fee simple absolute of all and singular the railway of the International Railroad Company, together with all of its properties whatsoever, and all of its corporate rights and privileges and franchises, and of all and singular the railway of the H. & G. N. R. R., with its properties, franchises and rights; all of the franchises and chartered powers and privileges of the International Railroad Company and of the H. & G. N. R. R. and of the I. & G. N. R. R. granted to them by virtue of their charters or any other laws, and all of the properties whatsoever of said railroads, which deed was duly delivered and executed to the I. & G. N. R. R.

(x) By the above foreclosures and sales a new corporation was constituted in 1879, to wit, the I. & G. N. R. R. of that year, in which [fol. 36] was vested all of the carrier properties and franchises to do and also the franchises to be of the sold-out railroad and its constituents; that is its and their charter and charters, as by law provided; and the old I. & G. N. R. R. corporation, existing before said sale, ceased to exist, and the new corporation went into action and op-

ated as such under the old charters until in 1910-1911, when it was again sold out, as appears below, and under the law then permitting it to be done, a new charter taken out and the I. & G. N. R'y formed. Wherefore, if the alleged contracts of 1872 and 1875 ever existed, which is denied, they were all eliminated in 1879, being then purely personal; and ceased to exist, and the statute of 1889 had no incidence, either to secure, extend said alleged contracts, or to come into action in any way, since there were no contracts of the I. & G. N. R. R. of 1879 which could give it incidence or bring it into action.

4. (a) The contracts claimed by the defendants are asserted by them to have been made in parol, whereas there were no such contracts, but the whole matter of the promotion of the railroad into Anderson County and Palestine was drawn up and reduced to writing, and all of the terms and conditions of such contracts were written, and all were complied with and fully performed and contained no stipulation whatever in regard to the general offices and shops and round houses.

(b) Under the law as it existed in 1872, it was permissible for counties and towns, such as the town of Palestine then was, to issue its or their bonds in the promotion of the construction of a railroad, provided the bonds should not be issued until the contract had been submitted to the freeholders and approved by them, and the work [fol. 37] contracted to be done by the railroad judicially ascertained by the County Court to have been completed all as provided by the Act of April 12, 1871, at page 29 (Gammel, Vol. 6, page 931). And in pursuance of this law, Judge John H. Reagan and over fifty (50) freeholders of Anderson County presented a petition to the County Court of that county, at its term beginning March 25, 1872, and petitioning the court to call an election to determine whether or not Anderson County would donate to the H. & G. N. R. R. $150,000, subject to the provisions of the act referred to above, to aid the road in the construction through Anderson County from the line of Houston County to or intersecting with the International Railroad, in the town of Palestine, and to secure the establishment and maintenance of a depot within one-half mile of the court house in that town, by or before the 1st of July, 1873; the bonds to be delivered as soon as the contract was complied with; and also they petitioned the court to call an election to determine whether $50,000 of additional bonds should be donated to any railroad company which should first build a railroad between Palestine and the north boundary of Anderson County; all on the terms and conditions as in the proposal set out.

(c) In pursuance of this petition the court ordered an election and submitted the proposition to the electors at an election held in Palestine commencing in May, 1872, and the election having been held, was declared by the court to have been held according to law, and the propositions to have been carried, all as appears from the order of the court.

[fol. 38] (d) On January 29, 1873, at a regular meeting of the County Court, the railroad presented its petition for the bonds, and the contract as set out and approved by the voters. The court entered its order declaring that the H. & G. N. had built from the north boundary of Houston County to an intersection with the International Railroad at Palestine, and had complied with the other conditions in the contract specified, and directed the bonds to issue for $150,000. All as appears in the order of the court.

(e) At this meeting of the court, one Shattuck protested in writing the issue of the bonds, on the ground, among others, that the machine shops and round houses had not been erected, as promised by the agents of the railroad, and that the election was not regularly held, and that the contract was not complied with, all of which objections were heard and overruled. And the depot not being completed according to the contract, a bond was accepted by the court to assure the completion thereof, and thereafter this bond was complied with.

The bonds of the county were issued to the H. & G. N. R. R. for $150,000.

(f) In November, 1874, Anderson County sued the H. & G. N. R. R. in the District Court of that county, for the cancellation of the bond issue, setting up that the written contract with the county was incomplete, and that the H. & G. N. R. R. or its agent had agreed (in parol) with the county that it would also accept the bond issue for $50,000 and build a railroad to the northern line of the county from Palestine; and that this agreement had not been complied with; and that the election was fraudulent and that the company had fraudulently [fol. 39] promised the voters that the road would be built to the northern line of the county; and that the H. & G. N. R. R. itself would accept the $50,000 bond issue and the burdens resulting therefrom, as well as the $150,000 bond issue; but that instead of complying with this undertaking it had violated the same and had continued on the International Railroad to the eastern part of the county; and that unqualified persons had voted and that the election and bond issue were void and fraudulent. No claim was made that the shops, roundhouses and general offices were contracted to be put at Palestine, the county seat of Anderson County; the general offices then being at Houston, Texas, in Harris County, and the shops not at Palestine.

The prayer was that the bonds for $150,000 should be delivered up and cancelled, and for general relief. The H. & G. N. R. R. demurred and denied all of these allegations, and set up that its principal offices were located in Houston, Harris County, as provided by law; and that it had in no particular failed to carry out its contract with Anderson County. Demurrers were sustained and the suit dismissed and affirmed against Anderson County by the Supreme Court of Texas, on the ground that such county could not attack its own acts, or the decree of the County Court, and that the documents were conclusive and were not subject to parol modification or addition. Nowhere in these proceedings was it charged that the railroad had broken its contract by failing to place the general offices and shops

and roundhouses at Palestine, but the District Court of the Supreme Court of Texas were of the opinion that the documents and solemn adjudications of the County Court of Anderson County could not be [fol. 40] modified. This suit was finally adjudicated by the District Court of Anderson County on December 28, 1875, and by the Supreme Court of Texas in 1879, and promptly published in the reports thereof in Vol. 52, page 228, and defendants rested thereunder, and plaintiff and its purchasers in right depended thereon; whereby, on the whole of the above, by the adjudication and the lapse of time the defendants are precluded.

5. (a) The I. & G. N. R. R. sued Anderson County in 1880-1 at Palestine, in the District Court of that county, to enjoin the defendant from collecting the county taxes on that part of its railroad constructed in that county by the International R. R. Co.; claiming that the I. & G. N. R. R. was a consolidated corporation, all as appears above, and set up a compromise with the State of Texas for a tax exemption. It was plead and involved that Anderson County had voted $150,00 in bonds to the H. & G. N. R. R. on condition that the company would build its road so as to intersect the International R. R. at Palestine, by the 1st of July, 1873; and that that company had complied with the conditions and completed its road to and made the intersection required by the end of December, 1872; and that in January, 1873, the county issued and delivered its bonds to that company, and that a portion of these bonds were on hand at the time when the consolidation was effected in September, 1783. The I. & G. N. R. R. Co. had listed and paid taxes in Anderson County on all its property except that acquired from the International R. R., which was claimed to be exempted under the compromise act. In November, 1880, the County Court of Anderson County levied on the International Railroad county taxes for 1875 to 1880, inclusive, hence [fol. 41] this suit to restrain the advertised sale by the collector, of the I. & G. N. R. R. from the depot in Anderson County to Longview, in Gregg County.

The act of the Legislature had exempted all properties constructed under the International charter then, or thereafter, owned by the I. & G. N. R. R. or its successors from all taxes of any character, for 25 years from the 5th of August, 1875, "except county and municipal taxes in such counties as have donated their bonds to aid in the construction of said railroad," as in the statute set out.

(b) On these facts the I. & G. N. R. R. sued to restrain the sale on the ground:

That the property was exempted from taxation in 1875 because of the International charter; and.

It is exempted from the 5th of August, 1875, because of the compromise act of March 10, 1875.

(c) It was claimed by Anderson County that the exemption was inapplicable because it violated the obligation of the contract entered into by Anderson County and the H. & G. N. R. R., under which bonds of that county were issued to that company; and that

it had issued this subsidy to the H. & G. N. R. R. and that the two corporations had been consolidated.

(d) The trial court held that because Anderson County had donated its bonds to aid in the construction of the H. & G. N. prior to the consolidation with the International, therefore, the International mileage after consolidation should not be exempted in Anderson County.

The Supreme Court perpetuated the preliminary injunction reversing the lower court, which had partially dissolved it, and granted the relief sought by the I. & G. N. R. R. Co.

[fol. 42] (d) In this litigation Anderson County claimed that it had issued the bonds on the basis of the written contract, and not on the bases now claimed by the defendants, and claimed the benefit on the exemption of the statute to such counties as "have donated their bonds to aid in the construction of said railroad," and affirmed said written contract which the defendants now attempt to modify by parol. The town of Palestine stood by and did not come forward. All of the defendants were citizens of Anderson County, and represented by it. The opinion of the Supreme Court of Texas was promptly reported in 69 Texas at page 654, and was well known to defendants, and by reason of the above and by lapse of time and long acquiescence of the defendants and the benefits which they asserted and claimed through Anderson County in this litigation they are precluded.

6. (a) In June, 1881, the I. & G. N. R. R. formed in 1879 issued its mortgage, subject to the first mortgage of 1879, and provided for an issue of bonds as therein set out, and this mortgage was made to the Famer's Loan & Trust Company of New York and the bonds duly issued.

(b) On March 1, 1892, the I. & G. N. R. R. issued its third mortgage to the Mercantile Trust Company, Trustee, of New York, as therein set out, and on the 25th of February, 1908, it filed its bill against the I. & G. N. R. R. Co. in the U. S. Circuit Court for the Northern District of Texas alleging default on the bonds and praying for the appointment of a Receiver of the I. & G. N. R. R.; and Thomas J. Freeman was appointed Receiver and qualified as such on the 28th of February, 1908.

[fol. 43] (c) Thereafter the Farmers' Loan & Trust Company, as Trustee, filed its bill in the same court against the I. & G. N. R. R. and Freeman, Receiver, No. 2510 in Equity. It set out that that there had been a default on the bonds secured by the mortgage of 1881, and prayed for the appointment of a Receiver and for foreclosure; and Freeman was also appointed Receiver in this case. The Circuit Court entered various orders and consolidated the cases into one, Equity 2501.

(d) On May 10, 1910, the court entered its decree of foreclosure of the mortgage of 1881, directing all the properties of the I. & G. N. R. R. to be sold upon the terms and conditions as in the decree

set out foreclosing the lien, and reversing jurisdiction as to any claims which might be presented against the purchaser or against the property.

It was decreed that the property should be sold, subject to the first mortgage and to any unpaid indebtedness or liabilities contracted by the I. & G. N. R. R. or by its constitutents, in the operation of its railroad, which the said Circuit Court might thereafter adopt or decree to be a prior or superior lien to the second mortgage, except such as should be paid or satisfied out of the income of the property in the hands of the Receiver under the orders of the court entered or to be entered; and subject also to such debts, claims, liens and demands of whatsoever nature theretofore incurred or created under orders of the court; or which might thereafter be incurred or created by the Receiver under orders of the court theretofore or thereafter entered, and not paid or to be paid out of the proceeds of the sale; and of all of these matters the court reserved jurisdiction at the foot of the decree.

[fol. 44] (e) Also it was decreed that the Master Commissioner, ordered to make the sale, should require claimants for unpaid debts or liabilities of the I. & G. N. R. R. to present the same for allowance and issue public notice to all claimants so to do, and that if they should not be presented within three months after the first publication of said notice, they should not be enforceable against the property sold, or the purchaser or his successors or assigns. The Master Commissioner, in pursuance of the order of the court, made due publication requiring all claimants of liabilities to present the same, and the defendants received full notice and refused to present their claim for the liability now asserted by them, and refused to come forward.

(f) It was further decreed that the purchaser or purchasers of the property, their successors and assigns, should have the right, within six months after the completion of the sale, or delivery of the deed of the Master Commissioner, to elect whether or not to assume or adopt any lease or contract made by the defendant railroad company, and that such purchaser or purchasers, his successors or assigns, should not be held to have assumed any of such leases or contracts which he or they should so elect not to assume, such election to be shown by filing with the clerk of the court from time to time within said period a description of actual or alleged contracts elected not to be assumed.

(g) It was further decreed that all questions not disposed of, including the disposition of all claims filed, or thereafter filed, were reserved by the court for future adjudication, and it was declared the court reserved jurisdiction of the cause and the property affected by this decree for the purpose of final disposition of all such questions [fol. 45] and matters; and that any party to the suit and any claimant whose claims have been or shall be so filed, might apply to the court for further orders and direction at the foot of the decree. Otherwise and generally, the court reserved jurisdiction di-

rectly and impliedly of the properties and for the purpose of enforcing the decree in all its terms.

(h) The court adjourned the sale from time to time, and finally decreed that it should be made on June 13, 1911, when it was made as in the decree provided by the Master Commissioner, at public outcry, in the town of Palestine, in Anderson County, Texas, and duly reported to the court, and by the court in all things approved in September, 1911; the defendants still refusing to appear and protest or enforce these alleged claims.

(i) By its charter of August, 1911, the I. & G. N. R'y was formed under the laws of Texas, and this charter authorized it to acquire, own, maintain and operate the railroads forming the I. & G. N. R. R. which had been purchased by Nicodemus at the sale; and placed its general offices at Houston, Texas.

(j) In August, 1911, a deed was executed by the Master Commissioner, the purchaser and the Farmers Loan & Trust Company conveying the properties purchased at the sale, being all the properties of the I. & G. N. R. R. Co.; and this deed was duly affirmed by the court, and the I. & G. N. R'y Co. went into action September 16, 1911, as a public carrier.

(k) The properties were sold for $12,645,000, paid in cash and [fol. 46] decree; and this bid was complied with and the proceeds by credit on the decree; but this was short of the total due under the applied and distributed under the order of the court.

(l) The I. & G. N. R'y, exercising the privileges and rights provided by the decree, and under an order formally entered by its Board of Directors, did within six months after the completion of the sale or delivery by the deed by the Master Commissioner elect that it would not assume or adopt any contract whatsoever (if any there may have been) made by either the I. & G. N. or the H. & G. N. R. R. with the defendants herein, or any one of them, or any claim made by them of contracts in essence as set out above; such election being shown by filing with the clerk of the U. S. Court at Dallas, Texas, within said six months, a description of the defendants' claims which were elected not to be assumed; and further within such time, exercising due precaution, though not required by the decree so to do; and the I. & G. N. R'y caused notice of its intention and election to be served upon the Commissioners' Court of Anderson County and the City Council of the City or Town of Palestine, by reading and delivering the same to such bodies at regular meetings. In making such election, the I. & G. N. R'y did not acknowledge the existence of the alleged contracts, which it always denied did exist, but declared and elected not to adopt them if they existed.

(m) The defendants were fully advised, during the whole of the receivership, 1908-1911, of the existence of such foreclosure suit, but stood by and refused to prosecute or assert their rights and permitted

the property to be sold under the conditions, all as stated above, and refused to come forward, whereby the properties were purchased and [fol. 47] a consideration paid, and their rights, if any they had, excluded, and the properties sold free of all their claims whatsoever.

(o) The defendants claim that the I. & G. N. R. R. of 1879, notwithstanding the sales of the property under foreclosure decrees in that year and the coming into action of a new corporation in that year, remained the I. & G. N. R. R. of the prior period, and notwithstanding that the claimants defendants refused to assert their claims in the U. S. Court, all as set out above, and submitted to the denunciation of their alleged claims as set out above, whereby they are precluded.

7. Wherefore, on all of the above, plaintiff respectfully represents:

(a) That if the alleged contract, designated as the livery stable contract of 1872, existed, which is denied, yet it is apparent upon its face that it was on the consideration of Judge Reagan's political service, and for this and other reasons apparent in the claim a nudum pactum.

(b) That if the alleged contract, designated as the livery stable contract, existed, which is denied, it could not exist as a separate contract for the benefit of the people of Palestine as differentiated from the people of the county.

(c) That if this alleged livery stable contract existed, which is denied, the benefit of the bond issue could not be differentiated so as to apply for the benefit of Palestine or the citizens thereof.

(d) That if the alleged contracts, designated as the one made at the livery stable and the other designated as the rent houses contract, existed, which is denied, they are in contradiction to the con- [fol. 48] tract submitted to the votes of the people, which is complete on its face and not subject to such side modifications.

(e) That if the alleged rent houses contract existed, which is denied, that it is a nudum pactum because there is and was no obligation on the part of the citizens to continuously rent houses, and no security therefor, and no time for the rental thereof, and because such alleged contract is otherwise void on its face for lack of consideration, and for other reasons.

(f) That if the alleged contracts existed, which is denied, they are all barred, and the respective statutes of limitation as set out above are complete bars thereof.

(*b*) That if the alleged contracts existed, which is denied, they are within the statute of frauds and denounced by it, and therefore cannot be enforced, being in parol.

(h) That the alleged contracts did not exist and all the claims made above are denied, and it is now alleged that no such agreements were made; and that if ever made, they were never approved

by the Board of Directors of either the H. & G. N. R. R. or of the I. & G. N. R R. or their stockholders.

(i) That if the alleged contracts existed, which is denied, then they were purely personal and eliminated by the foreclosures of 1879, and did not exist as to the I. & G. N. R. R. of 1879, but were eliminated by the foreclosures and sales of the property in 1879; and, therefore, did not exist as to the I. & G. N. R. R. in 1889; wherefore, the statute of 1889, R. S. 6423–4–5, has no incidence and did not come into operation.

(j) That if the alleged contracts existed, which is denied, then they were not the contracts contemplated by said statute of 1889, [fol. 49] and are not claimed to be and cannot be shown to have been of the scope contemplated by that statute, and, therefore, were not extended by the statute, and the statute is not applicable thereto.

(k) That if the alleged contracts existed, which is denied, the decree of the County Court of Anderson County, providing for the bond issue entered in 1873, and the other proceedings therein are res judicata and complete of the transaction; and the defendants are thereby precluded and cannot now collaterally attack said decree and make parol conditions or exceptions thereon.

(l) That if the alleged contracts existed, which is denied, the defendants are precluded by the litigations of Anderson County connected with or referring to the bond issue of $150,000, all as set out above.

(m) That if the alleged contracts existed, which is denied, the defendants have stood by for many years, and the plaintiff and the I. & G. N. R'y and its predecessors in right have relied on the decree of the County Court and all of the circumstances stated above. Whereby it would be inequitable and unjust to permit the defendants now to assert their claims.

(n) That if the alleged contracts existed, which is denied, said statute could have no incidence because there was a place designated in the charter of the H. & G. N. R. R. and the consolidated I. & G. N. R. R. for the general offices, to wit, Houston, Texas, whereby, as to such general offices, the statute had no incidence.

(o) That if the alleged contracts existed, which is denied, the defendants are precluded by the foreclosure proceedings of 1908-11 and the sale thereunder, and their failure to intervene in that suit. [fol. 50] and their refusal to present their claims therein, and by the reservations in the decree entered, as set out above.

(p) If the alleged contracts existed, which is denied, the defendants are precluded by the denunciation thereof by the I. & G. N. R'y under the decree of 1910, and the sale and foreclosure, all as set out above.

(q) It appears from all of the above that defendants rely upon said statute of 1889 to modify, add to and expand the alleged con-

tracts and secure them, and violate pre-existing mortgages and the rights of foreclosure thereunder, and thereby proposed to violate the obligations of contracts and due process of law.

(r) It appears from the whole of the above that the defendants have no equity or right, but are seriously clouding the title and burdening the property of the I. & G. N. R'y and the property conveyed to the plaintiff by the deed of trust foreclosed herein in May, 1915, to the great injury of the plaintiff and of its trust and beneficiaries and of any purchaser or purchasers of the property.

(s) That the plaintiff is entitled to relief against the claims of the defendants, and of their successors, and to the elimination of their claims, and to the freeing of the property from the burden imposed thereon by these claims and decree obtained by the defendants in the District Court of Cherokee County, and which is not res judicata as to plaintiff or any purchaser under the foreclosure pursued by it in this court, or under any other decree which may be [fol. 51] entered in this court providing for the sale and foreclosure of the property; and that any purchaser under the decree or decrees of this court is entitled to protection against such claims.

Fifth

Wherefore, on all of the above, plaintiff prays:

May it please the court to grant unto the plaintiff the writs of subpœna to be directed to the above mentioned defendants, thereby commanding them and each of them, to be at a certain time, and under a certain penalty therein to be limited, or as by law provided, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to perform and abide such further order, direction and decree herein as to this Honorable Court shall seem meet; the defendants being: Anderson County, Texas; the City of Palestine, Texas; George A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, R. M. Colley and P. H. Hughes; and the International & Great Northern Railway Company,

And that the court enter its decree forever enjoining the defendants from asserting their claims and maintaining that the general offices of the I. & G. N. R'y, or of any purchaser under the decree of foreclosure obtained by the plaintiff in this court, or any further decree of this court, operating the I. & G. N. R'y or its properties, and the shops and roundhouses thereof, or either of them, shall be at Palestine, in Anderson County, Texas, and be forever maintained there; and that the decree forever restrain and enjoin the defendants and their successors and those they may represent from making [fol. 52] such claims or assuming in any court to enforce the same, and restraining them from suing anywhere in restraint of the placing of said general offices, shops and round houses or either or any, at any place or places; and from harassing the plaintiff or the I. & G. N. R'y, or any said purchaser or purchasers, or any corporation

acquiring and operating the property, from having its general offices, round houses and shops elsewhere than at Palestine; and that it be decreed that defendants' claims are null and forever held for naught; and that the I. & G. N. R'y and the properties which have been foreclosed on, be freed from the burden and cloud of the defendants' claims.

And also that the plaintiff be granted all other relief whatsoever to which it may be entitled, in Law or Equity.

Respectfully, Central Union Trust Company of New York, Plaintiff. Hiram M. Garwood, Sam'l B. Dabney, Solicitors of Record. Larkin Rathbone & Perry, Baker, Botts, Parker & Garwood, Dabney, King, King & Woodul, Counsel.

[fol. 53] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (ANDERSON COUNTY, TEXAS)—Issued June 5, 1922; returned and filed June 14, 1923

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of America to Anderson County, Texas, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas in the Fifth Circuit, at a Court to be holden at the City of Houston in and for said District, twenty days after issuance hereof or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County, Texas, the City of Palestine, Texas; Geo. A. Wright; A. L. Bowers; John R. Hearne; Z. L. Robinson; E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes and International & Great Northern Railway Company, Filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson, Jr., Judge of said Court and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June Nineteen Hundred and Twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The Defendant Anderson County, Texas is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy.

[fol. 54] Marshal's Return

I certify that I received this Writ on the 9th day of June, 1922 at Tyler Texas and I executed same on the 10th day of June, 1922 at Palestine Texas by delivering a true copy of this writ to the within named party Walter C. Quick for Anderson County.

Phil E. Baer, U. S. Marshal E. D. T., by A. Magrill, Deputy, the 10th Day of June, 1922.

[File endorsement omitted]

Received June 19, 1922, Legal Dept. I. & G. N. R. R.

Paris, Texas, June 17, 1922.

[Title omitted]

L. C. Masterson, Esq., Clerk of the U. S. District Court, Houston, Texas.

Dear Sir: Please note that in the above case subpœna was served by me by deputy on the County of Anderson by service thereof on Mr. Walter C. Quick, County Clerk of that County. The original is with you showing service on Mr. Quick. Please attach this letter to the return on the original. I now state that the service was made on Mr. Quick as County Clerk and on behalf of the County of Anderson.

Yours truly, Phil E. Baer, U. S. Marshal.

[fol. 55] In United States District Court

Subpœna in Chancery (City of Palestine, Texas)—Issued June 5, 1922; returned and filed June 14, 1923

United States of America:

District Court, Fifth Circuit and Southern District of Texas

The President of the United States of America to the City of Palestine, Texas, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas in the Fifth Circuit, at a Court to be holden at the City of Houston in and for said District, twenty days after issuance hereof or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County, Texas, the City of Palestine, Texas; Geo. A. Wright; A. L. Bowers; John R. Hearne; Z. L. Robinson; E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes and International & Great Northern Railway Company, filed June 5th, 1922, by Cen-

tral Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson, Jr., Judge of said Court and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June, Nineteen Hundred and Twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The defendant The City of Palestine, Texas is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy.

[fol. 56] Marshal's Return

I certify I received this writ on the 9th day of June 1922 at Tyler Texas and I executed same on the 10th day of June 1922 at Palestine, Texas, by delivering a true copy of this writ to the within named party, A. L. Bowers for the City of Palestine.

Phil E. Baer, U. S. Marshal E. D. T., by A. Magrill, Deputy,
This the 10th Day of June, 1922.

Received June 19, 1922, Legal Dept. I. & G. N. R. R.

Paris, Texas, June 17, 1922.

[Title omitted]

L. C. Masterson, Esq., Clerk of the U. S. District Court, Houston, Texas.

Dear Sir: With reference to the subpœna in the above case upon the City of Palestine, please note that it was served upon A. L. Bowers, Mayor of the city and as representing the city.

Please attach this letter to my return on the original subpœna, which correctly recites service of copy on Mr. Bowers.

Yours truly, Phil E. Baer, U. S. Marshal.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (GEO. A. WRIGHT)—Issued June 5, 1922; returned and filed executed June 10, 1922

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of America to Geo. A. Wright, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Houston in and for said District twenty days after issuance hereof or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County Texas, the City of Palestine, Texas; Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes, and International & Great Northern Railway Company, filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson Jr., Judge of said Court, and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June Nineteen Hundred and twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The defendant Geo. A. Wright is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy.

[fol. 58] [File endorsement omitted.]

Marshal's Return

I received this writ on the 9th day of June, 1922 and executed same by delivering to the within named party Geo. A. Wright at Palestine Texas, a true copy of this writ on the 10th day of June, 1922.

Phil E. Baer, U. S. Marshal E. D. of T., by A. Magrill, Deputy, the 10th Day of June, 1922.

[fol. 59] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (A. L. BOWERS)—Issued June 5, 1922; returned and filed executed June 10, 1922

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of America to A. L. Bowers, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Houston in and for said District twenty days after issuance hereof or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County Texas, the City of Palestine, Texas; Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes, and International & Great Northern Railway Company, filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson Jr., Judge of said Court, and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June Nineteen Hundred and twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The defendant A. L. Bowers is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy.

[fol. 60] [File endorsement omitted.]

Marshal's Return

I Certify that I received this Writ of the 9th day of June, 1922 at Tyler Texas and I executed same on the 10th day of June, 1922 by delivering to the within named party A. L. Bowers at Patestine Texas a true copy of this Writ.

Phil E. Baer, U. S. Marshal E. D. of T., by A. Magrill, Deputy, the 10th Day of June, 1922.

[fol. 61] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (JOHN R. HEARNE)—Issued June 5, 1922; returned and filed June 14, 1922

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of America to John R. Hearne, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Houston in and for said District, twenty days after issuance hereof, or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County, Texas, the City of Palestine, Texas; Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes, and International & Great Northern Railway Company, filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson Jr., Judge of said Court, and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June Nineteen Hundred and twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U .S. District Court, Southern District—, by J. L. Sexton, Deputy.

The defendant John R. Hearne is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy.

[fol. 62] Marshal's Return

I certify that I received this Writ on the 9th day of June, 1922 at Tyler Texas and I executed same on the 10th day of June, 1922 at Patestine, Texas by delivering a true copy of this Writ to the within named party Jno. R. Hearne in person.

Phil E. Baer, U. S. Marshal E. D. of T., by A. Magrill, Deputy, the 10th Day of June, 1922.

[File endorsement omitted.]

[fol. 63] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (Z. L. ROBINSON)—Issued June 5, 1922; returned and filed June 14, 1922

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of American to Z. L. Robinson, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas, in the Fifth Circuit at a Court to be holden at the City of Houston in and for said District, twenty days after issuance hereof, or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County, Texas, the City of Palestine, Texas; Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes and International & Great Northern Railway Company, filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson, Jr., Judge of said Court and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June, Nineteen Hundred and twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The defendant Z. L. Robinson is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District —, by J. L. Sexton, Depufy.

[fol. 64] Marshal's Return

I hereby certify that I received this Writ on the 9th day of June, 1922 at Tyler Texas and I executed same on the 10th day of June 1922 at Palestine, Texas by delivering a true copy of this Writ to the within named party Z. L. Robinson in person.

Phil E. Baer, U. S. Marshal E. D. T., by A. Magrill, Deputy, the Tenth Day of June, 1922.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (E. W. LINK)—Issued June 5, 1922; returned and filed June 14, 1922

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of America to E. W. Link, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas, in the Fifth Circuit at a Court to be holden at the City of Houston in and for said District, twenty days after issuance hereof, or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County, Texas, the City of Palestine, Texas; Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes and International & Great Northern Railway Company, filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson, Jr., Judge of said Court and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June, Nineteen Hundred and twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The defendant E. W. Link is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District —, by J. L. Sexton, Deputy.

[fol. 66] Marshal's Return

I certify that I received this Writ on the 9th day of June, 1922 at Tyler Texas and I executed same on the 10th day of June 1922 at Palestine, Texas by delivering a true copy of the Writ to the within named party E. W. Link, in person.

Phil E. Baer, U. S. Marshal E. D. T.., by A. Magrill, Deputy, the 10th Day of June, 1922.

[File endorsement omitted.]

[fol. 67] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (R. C. SEWELL)—Issued June 5, 1922; returned and filed June 14, 1923

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of America to R. C. Sewell, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Houston in and for said District, twenty days after issuance hereof, or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County, Texas, the City of Palestine, Texas; Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes and International & Great Northern Railway Company, filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson, Jr., Judge of said Court and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June, Nineteen Hundred and twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The defendant R. C. Sewell is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy.

[fol. 68] Marshal's Return

I certify that I received this Writ on the 9th day of June, 1922 at Tyler Texas and I executed same on the 10th day of June 1922 at Palestine, Texas by delivering a true copy of this Writ to the within named party R. C. Sewell in person.

Phil C. Baer, U. S. Marshal E. D. of T., by A. Magrill, Deputy, on the 10th Day of June, 1922.

[File endorsement omitted.]

[fol. 69] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (JOHN M. COLLEY)—Issued June 5, 1922; returned and filed June 14, 1923

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of America to John M. Colley, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Houston in and for said District, twenty days after issuance hereof, or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County, Texas, the City of Palestine, Texas; Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes and International & Great Northern Railway Company, filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson, Jr., Judge of said Court and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June, Nineteen Hundred and twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The defendant John M. Colley is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy.

[fol. 70] Marshal's Return

I certify that I received this Writ on the 9th day of June, 1922 at Tyler Texas and I executed same on the 10th day of June 1922 at Palestine, Texas by delivering a true copy of this Writ to the within named party, Jno. M. Colley in person.

Phil E. Baer, U. S. Marshal E. D. of Tex., by A. Magrill, Deputy, the 10th Day of June, 1922.

[File endorsement omitted.]

[fol. 71] IN UNITED STATES DISTRICT COURT

SUBPŒNA IN CHANCERY (P. H. HUGHES)—Issued June 5, 1922; returned and filed executed June 10, 1922

UNITED STATES OF AMERICA:

DISTRICT COURT, FIFTH CIRCUIT AND SOUTHERN DISTRICT OF TEXAS

The President of the United States of America to P. H. Hughes, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States for the Southern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Houston in and for said District, twenty days after issuance hereof, or whensoever the said Court shall be there, to answer a Bill exhibited against Anderson County, Texas, the City of Palestine, Texas; Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, P. H. Hughes and International & Great Northern Railway Company, filed June 5th, 1922, by Central Union Trust Company of New York, and to do further and receive what the said court shall have considered in that behalf.

Witness the Honorable J. C. Hutcheson, Jr., Judge of said Court, and the Seal of the District Court of the United States, for the Southern District of Texas at the City of Houston this 5th day of June, Nineteen Hundred and twenty-two and of the Independence of the United States of America the 146th year.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

The defendant P. H. Hughes is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by J. L. Sexton, Deputy.

[fol. 72] [File endorsement omitted.]

Marshal's Return

I received this writ on the 9th June 1922 at Tyler Texas and executed same by Delivering to the within named party P. H. Hughes at Palestine Texas a true copy of this writ on the 10th day of June 1922.

Phil E. Baer, U. S. Marshal E. D. of T., by A. Magrill, Deputy, the 10th Day of June, 1922.

[fol. 73] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON, TEXAS

[Title omitted]

APPEARANCE OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY—Filed June 12, 1923

To the Honorable Judge of said court and to L. C. Masterson, Esq., clerk thereof:

Now comes the International & Great Northern Railway Company, one of the defendants in the above styled case, and appears therein and waives subpœna, and requests that this, its appearance, be duly entered, agreeing to appear and answer in all things as if duly subpœnaed.

Respectfully, International & Great Northern Railway Company, by Thomas J. Freeman, Its Solicitor of Record.

[File endorsement omitted.]

[fol. 74] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, AT HOUSTON

[Title omitted]

CERTIFICATE OF DISQUALIFICATION OF JUDGE—Filed June 29, 1922

Whereas I, Joseph C. Hutcheson Jr., Judge of the District Court of The United States for the Southern District of Texas was for five years connected with the City of Houston, either as its Chief legal adviser or its Mayor, and while legal adviser of the City of Houston, did on behalf of said City of Houston file a petition and brief amicus curiæ in the Supreme Court of Texas in the cause of the I. & G. N. R. R. versus Anderson County in support of the position taken by the I. & G. N. R. R. that it had a right to move its offices and shops to Houston as contended for by it therein, and whereas, I am advised that the matters pending and asserted in the above styled and numbered cause involved in some form the re-litigation of the questions asserted in that cause or at least involve analogous and closely related matters to those there asserted;

Therefore, it is ordered that there be entered on the record of this Court, that in my opinion such connection renders it improper for me to sit in said cause, either on the trial thereof or on any preliminary matters arising therein or thereout.

It is further ordered that a copy of this order shall be forthw certified to the Senior Circuit Judge in and for the Fifth Circ Houston Texas, June 29, 1922.

J. C. Hutcheson, Jr., Judge United States District Co Southern District of Texas.

[File endorsement omitted.]

[fol. 75] UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

ORDER DESIGNATING W. L. ESTES, JUDGE OF THE EASTERN DISTR OF TEXAS, TO HEAR AND TRY THIS CASE—Filed July 3, 1922

Whereas the Honorable Joseph C. Hutcheson, Jr., Judge of t District Court of the United States for the Southern District of Tex has, pursuant to the provision of Section 20 of the Judicial Co recused himself in the case of Central Union Trust Company New York, plaintiff, vs. Anderson County, Texas, *et* al., defendan No. 189 on the Equity docket of said Court at Houston, and caused that fact to be entered on the Minutes of said Court, and authenticated copy of said order to be certified to the undersigne

Now, therefore, I, Richard W. Walker, Senior Circuit Judge n present in said Circuit, do hereby designate and appoint the Ho orable W. L. Estes, Judge of the District Court of the United Sta for the Eastern District of Texas, to hold the District Court of t United States for the Southern District of Texas for the hearing a trial of the above numbered and entitled cause, and for that p pose to have and exercise within the first named District the sa powers that are vested in the Judge thereof, pursuant to statutes such case provided.

Done at Huntsville, Alabama, this 1st day of July, 1923.

R. W. Walker, United States Circuit Jud

[File endorsement omitted.]

[fol. 76] IN THE DISTRICT COURT OF THE UNITED STATES FOR T SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

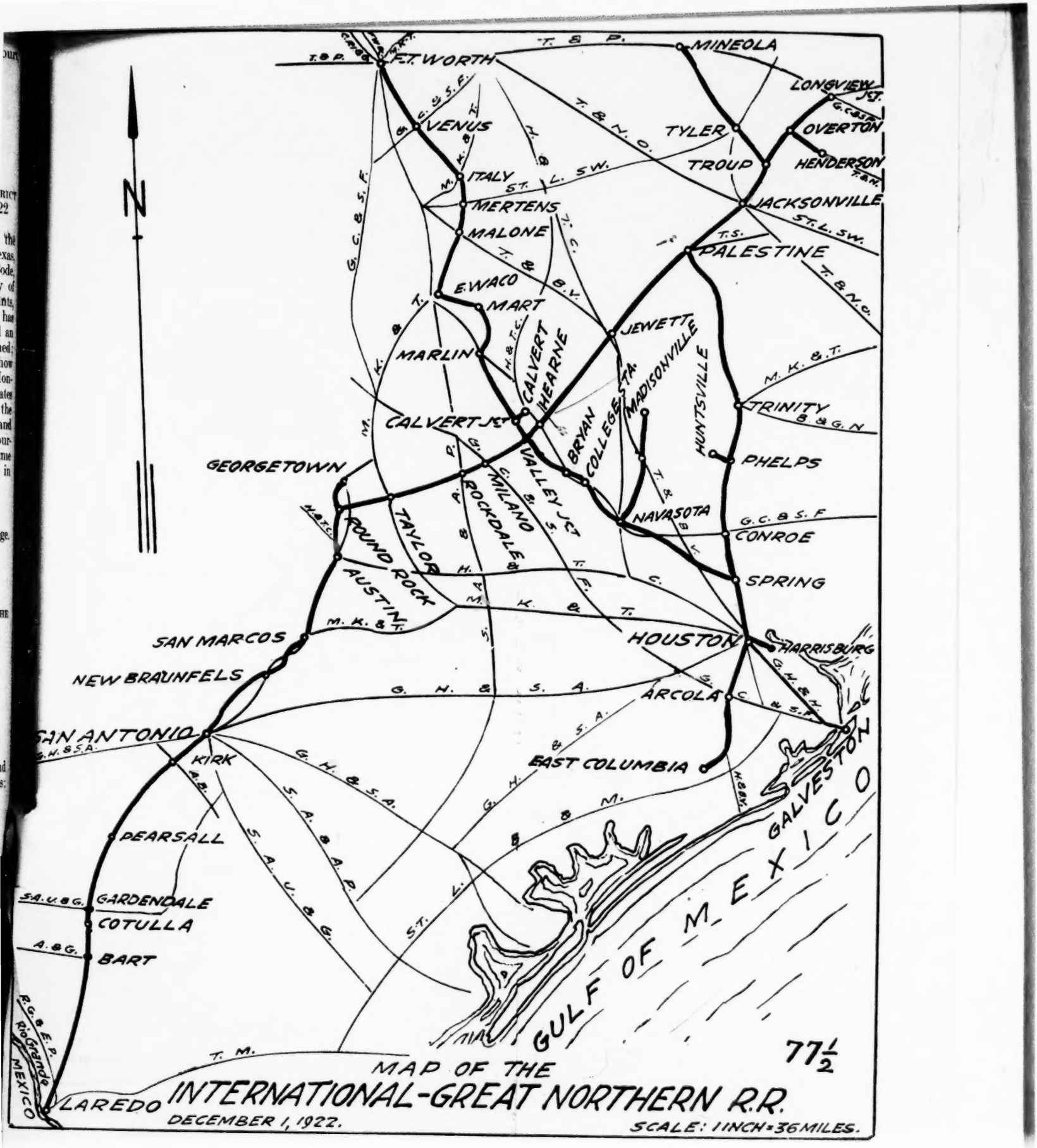
[Title omitted]

AMENDMENT TO BILL—Filed January 24th, 1923

To the Honorables the Judges of said Court:

Now comes the plaintiff, and amends its bill by:

Before paragraph numbered 7 on page 45 of the printed bill a after the words "whereby they are precluded," inserting as follo


N
FT. WORTH
T. & P.
MINEOLA
LONGVIEW JCT.
VENUS
TYLER
OVERTON
TROUP
HENDERSON
ITALY
MERTENS
JACKSONVILLE
MALONE
PALESTINE
E. WACO
MART
JEWETT
MARLIN
CALVERT
THEARNE
MADISONVILLE
HUNTSVILLE
TRINITY
CALVERT JCT.
BRYAN
COLLEGE STA.
PHELPS
GEORGETOWN
VALLEY JCT.
MILANO
ROCKDALE
NAVASOTA
CONROE
ROUND ROCK
TAYLOR
AUSTIN
SPRING
SAN MARCOS
HOUSTON
HARRISBURG
NEW BRAUNFELS
ARCOLA
SAN ANTONIO
KIRK
EAST COLUMBIA
PEARSALL
GARDENDALE
COTULLA
BART
LAREDO
GULF OF MEXICO
GALVESTON
MEXICO
MAP OF THE
INTERNATIONAL-GREAT NORTHERN R.R.
DECEMBER 1, 1922.
SCALE: 1 INCH = 36 MILES.
77 1/2

6-a. The railroad herein involved is an important one extending from Longview, in Northeast Texas, to Laredo on the Rio Grande and Mexican border; from Palestine to Houston; from Fort Worth to Spring and Houston; from Houston, by trackage arrangement over the Galveston, Houston & Henderson Railroad, to Galveston; all in Texas. Its main track mileage is 1106 miles, and it operates over 1,157 miles. It is predominantly engaged in interstate and international commerce and has a normal gross income of approximately $20,000,000 per annum, principally derived from intersate and international commerce, and is largely based upon Laredo on the Mexican border, one of the chief gateways into Mexico, and upon the ports of Houston and Galveston, Texas, delivering in and receiving out of Mexico, and in and out of Galveston and Houston; and through Longview and Fort Worth, and through other gateways and connections, carries great amounts of freight and passengers in interstate and international commerce; and is one of the most important interstate and international railroads in the Southwest; constituting, with reference to many sections, the link in the flow of international and interstate traffic, with the lowest grades and most direct route.

[fol. 77] Palestine is an interior country market town of about 10,000 people, situated north of the port of Houston about 160 miles, and with few industries and a small industrial population. The town does not furnish or train an adequate number of mechanics for the shops, or clerks for the general offices, nor can they be derived from the surrounding country; and it is inconveniently situated for the transaction of the business of the company, being remote from commercial centers.

The following plat shows the general location, and the lines of this road are heavily marked thereon.

(Here follows map, marked side folio page 77½)

[fol. 78] This railroad connects, among others, with the following important rail carriers, all heavily engaged in interstate and foreign traffic, and some of them parts of continental systems, viz.:

Texas & Pacific, marked on map "T. and P.," and meeting this road at Fort Worth and Longview, and through Longview connecting with the Missouri Pacific System at Texarkana, for which this road furnishes the joint travel route to Texas ports and Mexico, and a large part of Texas.

Santa Fe System, marked on map "G. C. & S. F.," meeting this system at Fort Worth, Houston, Galveston and other points.

Southern Pacific System, extending from New Orleans to San Francisco, marked on map "G. H. & S. A.," "T. & N. O." and "H. & T. C." meeting this system at Houston, Galveston, Austin, Waco, San Antonio, Fort Worth, Palestine and other points.

Frisco System, meeting this road at Fort Worth, and connecting with Gulf Ports over it.

Rock Island System, meeting this road at Fort Worth.

Cotton Belt System, meeting this system at Tyler, Waco and other points.

Missouri, Kansas & Texas System, marked on map "M. K. & T." meeting this road at Fort Worth, Waco, Houston, Austin, San Antonio, Galveston and other points.

Coast Line System, marked on map "S. L. B. & M.," extending from Brownsville on the Rio Grande to New Orleans, meeting this road at Houston.

Galveston, Houston & Henderson Railroad, extending from Houston to Galveston, marked on map "G. H. & H." approximately 49 miles, and half of the stock thereof is owned by the International-Great Northern Railroad—below mentioned, and it is a tenant line of the G. H. & H. and the operation over it is almost entirely by this road and by the Missouri, Kansas & Texas Railroad, the other tenant.

The Santa Fe, Missouri, Kansas & Texas, Coast Lines and South-
[fol. 79] ern Pacific Systems are great continental rail carriers, with many branches and lines, and connections, and doing an interstate and international business in competition with this road at many points, and to a great and increasing extent based on the Ports of Houston and Galveston.

The Texas branch of the Santa Fe System is the Gulf, Colorado & Santa Fe Railway, which has its general offices and headquarters at Galveston, Texas, giving it great influence and economies in doing and acquiring business in and out of the port. The port of Houston is the chief railroad center of Texas, with approximately seventeen railroads, separately corporated. Of these, the Galveston, Harrisonburg & San Antonio Railway Co., the Texas & New Orleans Railroad Co., the Houston East & West Texas Railway Co., and Houston & Texas Central Railroad Company, while separately incorporated, are affiliated in interest and known as the Southern Pacific System, connected at the Sabine and at El Paso with like affiliated lines, making one transportation system from and to New Orleans, Port Arthur, Houston, Galveston, El Paso and to and from Pacific Ports, competing directly with this road for interstate and international traffic to and from these ports, and elsewhere; and through the Houston & Texas Central Railroad, and The Houston East & West Texas Railway and the Texas & New Orleans Railroad Co., competing with this line for all rail traffic north, south, east and west and in every direction. The domiciles and principle offices and management of all these lines, constituting the Southern Pacific System in Texas and Louisiana, are located at the Port of Houston, giving it a dominant influence and facility over this road, as long as it is tied down in Palestine; as is the case also as to the other systems; and the Gulf Coast Lines also have their general offices and management at Houston.

This road has shops at San Antonio, Taylor and Mart, Texas, more conveniently located, and the shops at Palestine are inconveniently located for a great proportion of the work which must be done on rolling stock and the maintenance thereof. Palestine is within 81
[fol. 80] miles of Longview, the northern terminus of the line and,

therefore, too remote from much of the work which must be done; and yet it is claimed that rolling stock must be hauled long distances, by adequate shops created at great expense, in order to be repaired at Palestine, whereas it can be repaired more economically elsewhere, and mechanics and laborers better drawn from the population at industrial centers. To do the work at Palestine and to maintain the shops there would be a constant drain upon the revenue and a burden upon the interstate and international commerce, causing large losses and preventing the working of the road and the service of the public thereby in interstate and international commerce with a high efficiency.

The shops at Palestine can work approximately 500 to 600 men, and it is claimed that these or more must be employed there to do the shop work of the company and to supervise and record that work. Normally, approximately 1,200 men are required to do the repair work, and it is impossible to maintain them at Palestine, or to retain them at that place, without a larger expense and a loss in efficiency and productiveness of their efforts.

Having the shops at Palestine makes it necessary to have there a terminal, and to start train crews from that point, Longview the end of the line being only 81 miles distant, whereby under the existing system, and labor contracts against turn arounds and running through terminals great expense is incurred, and crews are paid on the basis of runs of about 81 miles and not 100 miles, as a full day or eight hours work, though much less time is taken.

To work the general offices of this large property and to have the officers reside at Palestine; who are claimed to constitute a part of the general offices, on the theory of the defendants; involves a personnel of approximately 500 people—and it will increase in the future, and a total population, including their families, of approximately 1,200 people; all of whom it is insisted, must be within the narrow confines of this country town and kept there forever.

The population of the town is insufficient, as a recruiting ground, and persons must be brought from a distance and extra compensation offered them, in order to induce them to reside in Palestine; [fol. 81] and the more efficient and ambitious constantly resign and remove, to the great dislocation of the offices and the loss of efficiency and increased expense.

It is necessary, for the efficient work of the railroad that the Traffic Department, the Auditor's Department, the General Manager's Department, and the other Departments, should be at a business center, where their influence can be felt and where traffic can be obtained and their work closely concentrated, and it is impossible to work the road efficiently and to obtain the large amount of traffic necessary to its economical working, if its headquarters and general offices be maintained at Palestine instead of Houston, the main base of the railroad and a large and growing port, and a city of approximately 200,000 people, and the most important point on the road.

In order to meet competition, above set out, it is necessary for this

road to maintain an active organization in the City of Houston, which to a large extent and at a large cost, duplicates that at Palestine.

Plaintiff alleges that the annual loss of gross business and income through having the offices and shops at Palestine has been and would be under present conditions and in the future, not less than $1,500,000 per annum and probably greater, and that the net loss is not less than $500,000 per annum and probably more; and as alleged on page 5 section 4, of the bill. And the greater proportion thereof results from the loss of interstate and international commerce.

The above losses will necessarily increase in the future, year by year, and connected with them and with this situation is an inconvenience to the public and the failure to give that service which this important road should give.

By the statute to provide for the termination of federal control of railroads etc., and to amend the act entitled "An Act to Regulate Commerce" cited as the Transportation Act of 1920, and by various statutes, Congress asserted a closer regulation of railroads engaged in interstate and international commerce, and extended its powers over them in many directions and provided for control and determination of rates by the Interstate Commerce Commission on the group basis with reference to the value of the property when effici- [fol. 82] ently and economically conducted, for the use and application of funds; and for the regulation of compensation and wages and income and the issue of certificates; and the control, use and disuse of terminals and facilities and equipment and rolling stock and the maintenance of the same and the interchange of traffic between different lines; and for the consolidations and agreements to consolidate of and by rail carriers, now separate corporations, all as in the Act provided; having in view the public service and just compensation to the owners of the property and in conflict with the position of the defendants and their claimed rights and assertions that the offices and shops of this large railroad are to be tied up in Palestine forever, without regard to the economical and efficient operation of the property; and these powers committed to the Interstate Commerce Commission have been and are being asserted and exercised by it.

Wherefore, the plaintiff respectfully represents that, on the enactment of the Transportation Act, and other National Statutes, and because of the burden on interstate and international commerce, and all of the matters plead above, even if the contracts alleged by the defendants did exist—which is denied—and are protected by the Statutes of 1889—(R. S. of Texas 6423-4-5)—which is denied—yet that under present conditions such alleged contracts are not enforceable and can not be enforced as against this railroad or anyone working the property, because so to enforce them would unnecessarily make the working thereof, expensive and inconvenient and a burden upon interstate and international commerce and deprive the owners thereof of their just income and the Government of its rights and control.

6-b. In the decree of foreclosure referred to in section 2 of the bill, it was ordered, in the event that the International and Great

Northern Railway did not pay $12,908,461.06 decreed with interest thereon at the rate of six (6%) per cent per annum from May 17, 1915, that then all of the properties of the Railway should be sold under the decree, as therein directed, the sale to be made on the request of the Solicitors of the Complainant.

Section 15 of the decree was as follows: "All questions not hereby disposed of are reserved for future adjudication," and it was also [fol. 83] provided therein as follows: commencing in folio 50:

"The Court reserves the right to resell the Mortgaged Property upon such notice as it may direct, at the risk and cost of the purchaser in case the purchaser thereof shall fail or omit to make any payment on account of the purchase price within twenty days after the entry of the order requiring such payment. The purchaser or purchasers his or their successors and assigns, shall not be required to see to the application of the purchase money and shall have the right to enter his or their appearance in this Court and to become a party to this cause.

The purchaser of the Mortgaged Property, in addition to the sum bid therefor, shall take the same and receive the deed or deeds therefor, subject to the satisfaction and discharge of any unpaid compensation which shall be allowed by the Court to the Receivers, and any indebtedness, obligations or liabilities which shall have been contracted or incurred by the Receivers before they shall have delivered possession of the property sold, whether or not represented by certificates and also any indebtedness or liability contracted or incurred by the defendant Railway Company in the operation of the Mortgaged Property prior to the appointment of the Receivers which is prior in lien or superior in equity to the First Refunding Mortgage and which shall not be paid or satisfied out of the income of the Mortgaged Property in the hands of the Receivers, upon the Court adjudging the same to be prior in lien or superior in equity to the First Refunding Mortgage and directing the payment thereof.

In the event that the purchaser, after demand made, shall refuse to pay any before-mentioned indebtedness or liability, the person holding the claim therefor, upon twenty days' notice to the purchaser, his successors or assigns, may file his petition in this Court to have such claim enforced against the Mortgaged Property in accordance wth the usual practice of this Court in relation to claims of a similar character, and such purchaser, his successors or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced and any party shall have the right to appeal from any judgment, decree or order made thereon. For the purpose of enforcing the foregoing provisions of this decree, jurisdiction of this cause is retained by this Court and the Court reserved the right to retake and resell the Mortgaged Property in case the purchaser, his successors and assigns shall fail to comply with any order of the Court for the payment of such prior indebtedness or liability within twenty days after the service of a copy of such order, or—if an appeal be taken from any such order, within twenty days

after service of written notice of the final affirmance of such orde upon appeal."

It is claimed by the defendants that by taking the charter unde the provisions of Revised Statutes of Texas of 1911, Article 6625– as the I. & G. N. Ry. did do—by its charter filed in the Departme of State of Texas, on August 10, 1911, and by its taking over th property and operating thereunder it did contract and incur th liability of the alleged contracts of 1872 and 1875 herein dealt wit and claimed to be secured by the Act of 1889, Revised Statutes Texas, Articles 6423-4-5. A copy of this decree of foreclosure i filed herewith for the convenience of the Court.

The Solicitors for the Complainant, after the filing of this bil made due demand on Lock McDaniel, appointed in the decree Sp cial Master to sell the property and all conditions, advertisemen and requirements being complied with, he sold the same at Hou ton, Texas at public outcry, to Earle Bailie and Maurice T. Moo for $5,000,000.00 the foreclosed mortgaged debt then amountin to over $17,000,000.00 the sale being subject to a First Mortga and the various obligations of the property and Receivership, as i [fol. 84] the decree set out; and Messrs. Bailie and Moore assigne their bid to the International-Great Northern Railroad Compa (hereinafter designated as the "I.-G. N. R. R."), and on Augu 10, 1922, this Court affirmed the sale and directed the deed to b made to the I.-G. N. R. R., and the property turned over to it, a in the Order of Confirmation set out; and thereafter, on or abo November 25, 1922, the deed in the form prescribed having bee executed, was delivered, and at the end of November 30, 1922, th whole railroad and all the assets and properties of the sold out rai way and of the Receiver, or held by him, were turned over to th I.-G. N. R. R. and it then went into action as a public carrier.

In the decree of confirmation of the sale it was ordered, amo other things:

"Eighth. The Court reserves jurisdiction over the property sol with reference to all claims against the sold out International & Gre Northern Railway Company, which have been litigated or may her after be litigated in this or any Court, so far as to enforce the pa ment of any judgments therefor out of the property sold, if the sam be not paid within ninety days after the delivery of the deed (herei provided for) to the purchasers or their assignee, if such judgment are within the protection of the Revised Statutes of Texas, Articl 6624 and Article 6625, or either of such articles, and the payme thereof is hereby made a charge upon the property.

Ninth. All questions relating to amounts of compensation, charge allowances, costs, disbursements and expenses referred to in sa Final Decree, and to suits now pending in this Court in this cause or affecting the property above dealt with, are hereby respectively reserved by this Court for further hearing and determination, and all adjustments and payments to be made, unless agreed upon by th

parties in interest, shall hereafter be determined, fixed, allowed and settled by this Court, and all questions not hereby disposed of are reserved for future adjudication, including all claims pending or hereafter made against the property sold originating under the Receiver, the defendant or its predecessors in title. Any party to this cause and any party who has intervened in this cause, may at any time apply to this Court for further relief at the foot of this order."

A copy of this decree is filed herewith for the convenience of the Court.

In the decree of foreclosure of May 17, 1915, it was furthermore ordered:

"The Receivers shall not more than twenty nor less than ten days prior to the date fixed for the sale of the Mortgaged Property under this decree, file with the Clerk of this Court,

(a) A statement showing as definitely as practicable all indebtedness, obligations and liabilities contracted or incurred by them then remaining unpaid;

(b) A statement showing as definitely as practicable all indebtedness or liabilities contracted or incurred by the defendant Railway Company in the operation of the Mortgaged Property prior to the appointment of the Receivers and which, so far as they are informed, are claimed to be prior in lien or superior in equity to the First Re- [fol. 85] funding Mortgage;

(c) A statement showing as definitely as practicable all outstanding contracts and leases (including all traffic, trackage, terminal, crossing, operating and other executory contracts) to which the defendant Railway Company or the Receivers may be parties, and stating, in the case of contracts or leases to which the defendant Railway Company is a party, whether such contracts or leases have been assumed or adopted by the Receivers.

Each of such statements shall be advisory only and nothing therein contained shall be binding upon the purchaser or purchasers at said sale, nor shall such statements constitute ground for release from any debt because of any representation therein or omission therefrom.

Any such claim for indebtedness or liabilities which shall not have been included in such statement of the Receivers or which shall not have been presented in writing to the Receivers or filed with the Clerk of this Court prior to the time of delivery of possession of the Mortgaged Property, shall be presented for allowance and filed within six months after the first publication by the Receivers of a notice to the holders of such claims to present the same for allowance. The Receivers shall publish such notice upon request of the solicitors for the complainant, once a week for four successive weeks in a newspaper of general circulation published in each of the following places, to-wit: Laredo, San Antonio, Austin, Palestine, Longview, Fort Worth, Houston and Galveston, in the State of Texas, or in such of said, or other, papers as the Court may by order herein hereafter direct; and

the Receivers shall also, on or before the date of the last publication of such notice, mail a copy of such notice to each of such holders of said claims as may be known to the Receivers at the last post office address known to the Receivers.

"Any such claim which shall not be so presented or filed within the period of six months after the first publication of such notice shall not be enforcible against the Receivers nor against the Mortgaged Property nor against any purchaser, his successors, or assigns. The purchaser of the Mortgaged Property, and his successors and assigns shall have the right to enter his or their appearance in this cause and he or they or any of the parties to this suit shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which thereafter may arise or be presented which would be payable by such purchaser, his successor or assigns or which would be chargeable against the Mortgaged Property in addition to the amount bid at the sale and he or they may appeal from any decision relating to any such claim, demand or allowance.

The purchaser and his successors or assigns shall have the right for the period of six months after the delivery of the Special Master's deed, as hereinafter provided, to elect whether or not to assume or adopt any lease or contract made by the defendant Railway Company and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this Court within said period of six months."

All of the foregoing directions have been complied with, but none of the claims of the defendants were recognized, or listed, and the purchaser will not elect to assume them.

The I.-G. N. R. R. is a corporation duly organized in 1922, and as provided in its charter, domiciled in the City of Houston in Harris [fol. 86] County, Texas, where it is provided in its charter shall be established and maintained the principal business *business* office, the public office and general offices of the corporation.

A copy of the decree of foreclosure of May 17, 1923, is filed herewith, and on the basis of that whole decree and of the whole decree of confirmation, both a part of this proceeding and of this record as well as on the basis of the parts set out, this Court has jurisdiction.

Whereby, on all of the above, this Court has reserved jurisdiction of this case, as well as has jurisdiction thereof independently of said decrees, as ancillary to No. 49 in Equity, and in aid of the decree of foreclosure, and as this suit was originally brought.

Upon this whole amendment, and upon the bill, and each and both of them, the Plaintiff prays as in the bill set out, and that it have general relief and all such relief as it may be entitled to.

Central Union Trust Company of New York, By H. G. Garwood, Sam'l B. Dabney, Its Solicitors of Record. Larkin, Perry & Rathbone, Baker, Botts, Parker & Garwood. Dabney, King, King, and Woodul, Counsel.

[File endorsement omitted.]

[fol. 87] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted.]

MOTION OF DEFENDANTS ANDERSON COUNTY ET AL. TO DISMISS BILL OF COMPLAINT—Filed June 28, 1922

Motion of Defendants Anderson County, Texas, The City of Palestine, Texas, Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, and P. H. Hughes, to Dismiss the Bill of Complaint.

Come now the defendants, Anderson County Texas, The City of Palestine, Texas, Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link; R. C. Sewell; John M. Colley and P. H. Hughes and move the Court to dismiss the bill of complaint herein for the reasons and upon the grounds that as appears upon the face of the bill the jurisdiction of this court as a Federal Court of the United States to hear and determine this suit is declared and invoked, only because the action is between citizens of different States; that the plaintiff at the time of the commencement of this suit was, and is now, an inhabitant and resident of the City of New York, in the State of New York; and that these defendants, above named, were not at the time of the commencement of this suit and are not now, inhabitants or residents of the Southern District of Texas, but at said time were, and are now, each and all of them inhabitants and residents of Anderson County, Texas, which is in the Eastern District of Texas.

And for that, as also appears from the face of the bill, the general offices of the International & Great Northern Railway Company, the co-defendant of these defendants and the only other defendant herein, were at the time of the commencement of this suit, [fol. 88] and are now, located and established in the City of Palestine, Texas, which is in Anderson County, Texas and in the Eastern District of Texas, and which, therefore, under the laws of the State of Texas, was at the time of the commencement of this suit, and now, the domicile of said International & Great Northern Railway Company; and it further appearing from the face of the bill that by final judgment in the Courts of the land, in full force at the time of the commencement of this suit and now, and in all things operative and binding, then and now, upon said International & Great Northern Railway Company, said Palestine, Texas had been established as the place of its domicile and is now its place of domicile.

Wherefore, as is disclosed on the face of the bill of complaint, this suit is not properly cognizable by this honorable Court and this Court is without jurisdiction of it; and these defendants accordingly pray that it be dismissed at the plaintiff's cost.

Nelson Phillips, M. C. Campbell, Solicitors of Record. Phillips & Townsend, Campbell, Greenwood & Barton, Seagler & Pickett, Campbell & Sewell, Counsel.

[File endorsement omitted.]

[fol. 89] STATEMENT OF THE EVIDENCE

IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF THE EVIDENCE, ETC.—Filed September 4th, 1923

Be it remembered that upon the trial of this case on the motion of the defendants, presenting the same, to dismiss the case, after a reading of the motion, the plaintiff introduced in evidence documents and made showing as follows, as stated in condensed form; the defendants introduced nothing in evidence:

1. On the bill of the Central Trust Company of New York, in the suit entitled "Central Union Trust Company of New York vs. International & Great Northern Railway Company," No. 49 in Equity, in the District Court of the United States for the Southern District of Texas, at Houston, Texas, on August 10, 1914, James A. Baker and Cecil A. Lyon were appointed Receivers of said Railway Company by a decree, and all the property and assets of that railway put in the hands of such receivers, and through them taken possession of by the Court; and thereafter Cecil A. Lyon, deceased, and James A. Baker was appointed sole Receiver, and continued, under the direction of the Court, to operate the property.

2. After the institution of the above suit, No. 49 in Equity, certain other parties were made defendants, and on May 17, 1915, the Court entered its decree of foreclosure of all of the properties of said Railway Company, foreclosing the mortgage sued on of 1911; and decreeing that if the said Railway Company did not pay $12,908,461.06, with interest thereon at the rate of six per cent (6%) per annum from May 17, 1915, etc., then all of the properties should be sold, on the request of the solicitors of the Complainant, and providing for the sale of the same by the Special Master appointed by the Court; and after the filing of this suit, the amount decreed being unpaid, such Special Master was duly called upon to make [fol. 90] the sale, and in due pursuance of the decree did make the sale of all of said properties whatsoever, including the trackage of about 1,106 miles of main track road, as shown on the map embodied in the amendment to the bill (as was included in the decree of foreclosure) and all assets, moneys, moneys, claims whatsoever in the hands of or belonging to the Receiver or Receivers, or in the control of the Court; and the Special Master made due report to the Court of the sale made by him to Earle Baile and Maurice T. Moore for $5,000,000, subject to liens of an existing First Mortgage and other and various prior obligations fixed by the Court and made prior in right if not prior in time, as well as obligations which the Court might thereafter fix. Thereafter, said Baile and Moore assigned their bid and right to purchase the property, and the whole matter was presented to the Court, and the Judge of the United

States District Court above mentioned did, on August 10, 1922, confirm the sale, and direct the Master, the Receiver, and the defendant Railway, and the foreclosing Complainant, (Central Trust Company of New York, under the changed name of Central Union Trust Company of New York) to execute a deed to a corporation to be termed International-Great Northern Railroad Company, upon the terms and conditions as in said decree set out.

3. In the decree of foreclosure of May 17, 1915, it was, by the Court decreed as follows:

"* * * It was ordered, in the event that the International and Great Northern Railway did not pay $12,908,461.06 decree, with interest thereon at the rate of six (6%) per cent per annum from May 17, 1915, then that all of the properties of the Railway should be sold under the decree, as therein directed, the sale to be made on the request of the Solicitors of the Complainant."

Section 15 of the decree was as follows: "All questions not hereby disposed of are reserved for future adjudication." This section followed all other portions of this decree, herein referred to. And it was also provided therein, as follows, commencing in folio 50:

"The Court reserved the right to resell the Mortgaged Property upon such notice as it may direct, at the risk and cost of the purchaser in case the purchaser thereof shall fail or omit to make any payments on account of the purchase price within twenty days after [fol. 91] the entry of the order requiring such payment."

It was decreed that the purchaser, in addition to the sum bid should take the property and receive the deed or deeds therefor, subject to the satisfaction and discharge of any unpaid compensation which shall be allowed by the Court to the Receivers, and any indebtedness, obligations or liabilities which shall have been contracted or incurred by the Receivers before they shall have delivered possession of the property sold, whether or not represented by certificates, and also any indebtedness or liability contracted or incurred by the defendant Railway Company in the operation of the Mortgaged Property prior to the appointment of the Receivers, which is prior in lien or superior in equity to the First Refunding (Foreclosed) Mortgage, and which shall not be paid or satisfied out of the income of the Mortgaged Property in the hands of the Receivers, upon the Court adjudging the case to be prior in lien or superior in equity to the First Refunding Mortgage and directing the payment thereof.

It was further decreed that in the event that the purchaser, after demand made, shall refuse to pay any before-mentioned indebtedness or liability, the person holding the claim therefor, upon twenty days notice to the purchaser, his successors or assign, may file his petition in this Court to have such claim enforced against the Mortgaged Property in accordance with the usual practice of this Court in relation to claims of a similar character, and such purchaser, his

successors or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and any party shall have the right to appeal from any judgment, decree or order made thereon.

It was also decreed that for the purpose of enforcing the foregoing provisions of this decree, "jurisdiction of this cause is retained by this Court, and the Court reserves the right to retake and resell the Mortgaged Property in case the purchaser, his successors and assigns shall fail to comply with any order of the Court for the payment of such prior indebtedness or liability within twenty days after the service of a copy of such order, or, if any appeal be taken [fol. 92] from any such order within twenty days after service of written notice of the final affirmance of such order upon appeal."

In the decree of foreclosure of May 17, 1915, it was furthermore ordered:

"The Receivers shall, not more than twenty nor less than ten days prior to the date fixed for the sale of the Mortgaged Property under this decree, file with the Clerk of this Court:

(a) A statement showing as definitely as practicable all indebtedness, obligations and liabilities contracted or incurred by them then remaining unpaid.

(b) A statement showing as definitely as practicable all indebtedness or liabilities contracted or incurred by the defendant Railway Company in the operation of the Mortgaged Property prior to the appointment of the Receivers and which, so far as they are informed, are claimed to be prior in lien or superior in equity to the First Refunding Mortgage which was foreclosed.

(c) A statement showing as dfinitely as practicable all outstanding contracts and leases (including all traffic, trackage, terminal crossing, operating and other executory contracts) to which the defendant Railway Company or the Receivers may be parties, and stating in the case of contracts and leases to which the defendant Railway Company is a party, whether such contracts or leases have been assumed or adopted by the Receivers."

"Each of such statements shall be advisory only, and nothing therein contained shall be binding upon the purchaser, or purchasers at said sale, nor shall such statements constitute ground for the release from any debt because of any representations therein or omission therefrom.

Any such claim for indebtedness or liabilities which shall not have been included in such statement of the Receivers or which shall not have been presented in writing to the Receiver or filed with the Clerk of this Court prior to the time of delivery of possession of the Mortgaged Property, shall be presented for allowance and filed within six months after the first publication by the Receivers of a notice to the holders of such claims to present the same for allowance. The Receivers shall publish the such notice upon request of the solicitors

for the complainant, once a week for four successive weeks in a newspaper of general circulation published in each of the following places, to-wit: Laredo, San Antonio, Austin, Palestine, Longview, Fort Worth, Houston and Galveston, in the State of Texas, or in such of said or other papers as the Court may by order herein*here*after direct; and the Receivers shall also, on or before the date of the last publication of such notice mail a copy of such notice, to each of such holders of said claims as may be known to the Receivers at the last post office address known to the Receivers.

Any such claim which shall not be so presented or filed within the period of six months after the publication of such notice shall not be enforcible against the Receivers nor against the Mortgaged Property nor against any purchaser, his successors or assigns. The Purchaser of the Mortgaged Property, and his successors and assigns, shall have the right to enter his or their appearance in this cause, and he or they or any of the parties to this suit shall have the right to contest any claim, demand or allowance existing at the time of sale and then undetermined, and any claim or demand which thereafter may arise or be presented which would be payable by such purchaser, his successors or assigns, or which would be chargeable against the Mortgaged Property in addition to the amount bid at the sale, and he or they may appeal from any decision relating to any such claim, demand or allowance."

[fol. 93] It was shown that the statement had been duly filed and the notices and advertisements duly made, as provided above should be done.

[fol. 94] EXHIBIT IN EVIDENCE

At a Term of the District Court of the United States for the Southern District of Texas, Houston Division, in the City of Houston, on the 10th Day of August, 1922.

Present: Hon. J. C. Hutcheson, Jr., United States Circuit Judge.

In Equity. No. 49

CENTRAL UNION TRUST COMPANY OF NEW YORK, Trustee, Complainant,

against

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY et al., Defendants

Order Confirming Sale

This cause came on further to be heard on the petition of Earle Bailie and Maurice T. Moore filed July 31, 1922, and on the Special Master's Report of Sale filed July 28, 1922, and on all other proceed-

ings in the above-entitled Cause, and was argued by counsel, and thereupon, upon consideration thereof, the Court being fully advised, finds, adjudges, and decrees as follows:

I. The Special Master appointed in the Final Decree entered May [fol. 95] 17, 1915, has fully complied with all the directions in said Final Decree contained as to the sale of the property in and by said Final Decree directed to be sold.

II. The sale of said property held July 28, 1922, was held in all respects as provided by said Final Decree, and at said sale the Special Master sold at public auction to Earle Bailie and Maurice T. Moore the property in and by said Final Decree directed to be sold, to wit:

All railroads, lines of railroad, extensions, branches and bridges, all locomotives, cars, rolling stock and equipment, all premises, leases, leasehold interests, contracts, rights, privileges, franchises and all other property, real, personal and mixed, of every description whatsoever which International and Great Northern Railway Company (hereinafter called the Railway Company) owned or was entitled to at the time of the execution and delivery of its First Refunding Mortgage, dated August 1, 1911, to Central Trust Company of New York, as Trustee, or which was thereafter acquired by said Railway Company.

All lands, contracts, equipment, rolling stock and all property of every description whatsoever at any time acquired by the Receivers of the said Railway Company appointed by the United States District Court for the Southern District of Texas by order made and entered on or about August 10, 1914, or by the sole Receiver thereafter appointed, including all balances of cash, credits and income remaining in the hands of the Receivers, or Receiver, after application thereof in accordance with the provisions of said Final Decree.

All and singular the tenements, hereditaments and appurtenances belonging or in any wise appertaining to the property hereinbefore [fol. 96] designated, or any part or parcel thereof, and the reversion and reversions, remainder and remainders, tolls, income, rents, issues and profits thereof, and also all of the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said Railway Company and of said Receivers, or Receiver, of, in and to the same and any and every part thereof.

as an entirety for the sum of $5,000,000, said sum being the highest bid for said property.

III. Said Earle Bailie and Maurice T. Moore have, by their petition filed in this cause, stated that they propose to assign all their right, title and interest in and to the property described in the form of deed hereto annexed and marked Schedule B, sold to them as aforesaid, including their right to receive a deed or deeds or other instruments of transfer and conveyance thereof as provided in said Final Decree, to a corporation organized, or to be organized under the laws of Texas, having power to acquire said property, which they

propose shall be named International-Great Northern Railroad Company. Said corporation is hereafter for convenience referred to by said name of International-Great Northern Railroad Company, but if it shall have a different name the provisions of this order respecting International-Great Northern Railroad Company shall apply to said corporation under such different name.

It is therefore ordered, adjudged and decreed as follows:

First. The Special Master's Report of Sale filed herein July 28, 1922, is in all things confirmed and the sale therein reported, namely: the [fol. 97] sale to Earle Bailie and Maurice T. Moore of all property in and by the Final Decree in this cause directed to be sold, as an entirety, for the sum of $5,000,000, is made final and absolute, subject, however, to all the terms and conditions of said Final Decree and of this order.

Second. The Special Master is directed, upon the delivery to him of the notes and bonds (or the certificate of the Complainant representing the same) as in Article Fifth below set out, and upon there being filed in this cause by Earle Bailie and Maurice T. Moore the assignment (in form hereto attached, and marked Schedule A, which is hereby approved), to International-Great Northern Railroad Company of all their right, title and interest in and to the property covered by said sale made by the Special Master, to execute and deliver to International-Great Northern Railroad Company a deed of the property described in the form of deed hereto annexed and marked Schedule B, substantially in said form, which is approved by this Court, and the Railway Company, the Receiver herein, and Central Union Trust Company of New York, as trustee under the First Refunding Mortgage, are directed to join with the Special Master in the execution and delivery of a deed to International-Great Northern Railroad Company substantially in the form of said deed Schedule B, or, if said International-Great Northern Railroad Company shall so request, to execute and deliver to said Company separate deeds or releases of all their right, title and interst of, in and to the property so conveyed, assigned and transferred to said International-Great Northern Railroad Company by the Special Master.

Third. Upon the production of said deed or deeds, International-Great Northern Railroad Company shall be let into the possession of the property thereby conveyed or transferred, and shall after such [fol. 98] delivery of possession, hold, possess and enjoy the property so conveyed and transferred, and every part and parcel thereof, free from any trust or lien imposed thereon by the First Refunding Mortgage and free from all claims, rights, interest or equity of redemption, in or to the same by or of the Railway Company, its successors and assigns, and by or of all persons claiming by, under or through the Railway Company, subject, however, to all the terms and conditions of said Final Decree and of this order.

Fourth. Upon the delivery to International-Great Northern Railroad Company of the deed to be executed and delivered to it by the Special Master pursuant to the provisions of Article Second hereof, the Receiver shall assign, transfer and deliver to said International-Great Northern Railroad Company all cash, current assets and materials and supplies then in the possession of the Receiver.

Fifth. There shall be credited upon the purchase price of the property sold at said sale, for the Three Year Gold Notes and appurtenant coupons held subject to the order of the Special Master pursuant to the certificate of Central Union Trust Company of New York deposited by said Earle Bailie and Maurice T. Moore with the Special Master, as stated in his Report of Sale as a pledge that they would make good their bid for said property, such sum as would be paid in cash upon such Gold Notes and coupons out of the proceeds of sale if the whole amount of the purchase price had been paid in cash. In advance of the delivery of said deed or deeds, and within sixty days from the date of the entry of this order, or within such additional period as this Court may hereafter by its order or decree permit, said Earle Bailie and Maurice T. Moore or International-Great Northern Railroad Company shall secure the payment of the remainder of the purchase price of the property sold at said sale by [fol. 99] turning over to the Special Master to be delivered by him to the Clerk of this Court, to be cancelled or credited as may be provided by the further order of this Court and as provided in said Final Decree, bonds, notes and coupons to at least the following amounts in addition to the Three Year Gold Notes specified in said certificate of Central Union Trust Company of New York, heretofore deposited with the Special Master:

First Refunding Mortgage Bonds of International and Great Northern Railway Company $457,000 principal amount;
Three Year Gold Notes of International and Great Northern Railway Company, $3,543,000 principal amount.

Said Bonds, Notes and coupons shall be in bearer form or accompanied by proper transfers to the Special Master. In lieu of turning over to the Special Master said Bonds and Notes, the Special Master shall accept the certificate of the Complainant, that it holds subject to his order Bonds and Notes of the amount and character herein specified. No payment in cash shall be required at this time on account of the purchase price of any of said property nor until this Court shall so require, but this Court reserves jurisdiction from time to time to require such further payment or payments in cash on account of said purchase price as the Court may direct, and this Court reserves a paramount lien and charge upon the property to be conveyed, for the payment into this Court in cash of the unpaid part of the purchase price.

Sixth. Upon the execution and delivery by the Special Master to International-Great Northern Railroad Company of a deed substantially in the form of said deed Schedule B hereto and the exe-

cution and delivery by International-Great Northern Railroad Com-
[fol. 100] pany to the Special Master of a counterpart thereof, all obligations and liabilities of Earle Bailie and Maurice T. Moore on account of the purchase of any of the property sold as aforesaid or by reason of their bid at said sale under said Final Decree or the acceptance of said bid, shall forthwith cease and determine and said Earle Bailie and Maurice T. Moore shall individually be discharged from all such obligations and liabilities.

Seventh. The Three Year Gold Notes and coupons held subject to the order of the Special Master pursuant to the certificate of Central Union Trust Company of New York, deposited by said Earle Bailie and Maurice T. Moore with the Special Master as stated in his said Report of Sale, and the Bonds, Notes and coupons represented by any certificates of the Complainant which may be received by the Special Master pursuant to the provisions of Article Fifth of this order, shall remain with the Complainant by whom such Bonds, Notes and coupons are held, to abide the further order of this Court; and when the amounts payable out of the proceeds of sale upon the First Refunding Mortgage Bonds and Three Year Gold Notes and coupons secured respectively by the First Refunding Mortgage foreclosed and by the Trust Agreement enforced in and by the Final Decree in this Cause, shall have been determined as in said Final Decree provided, and by the further order of this Court, the Special Master shall give notice of the time and place where said Bonds, Notes and coupons may be presented for payment as in said Final Decree provided, and all such Bonds, Notes and coupons presented for payment shall be stamped under the Court's direction with a notation of the credit or payment thereon of the amount so payable and such Bonds, Notes and coupons shall thereafter be returned to the respective owners and holders thereof.

[fol. 101] Eighth. The court reserves jurisdiction over the property sold with reference to all claims against the sold out International & Great Northern Railway Company, which have been litigated or may hereafter be litigated in this or any court, so far as to enforce the payment of any judgments therefor out of the property sold, if the same be not paid within ninety days after the delivery of the deed (herein provided for), to the purchasers or their assignee, if such judgments are within the protection of the Revised Statutes of Texas, Article- 6624 and 6625, or either of such articles, and the payment thereof is hereby made a charge upon the property.

Ninth. All questions relating to amounts of compensation, charges, allowances, costs, disbursements and expenses, referred to in said Final Decree, and to suits now pending in this Court in this cause, or affecting the property above dealt with, are hereby respectively reserved by this Court for further hearing and determination, and all adjustments and payments to be made, unless agreed upon by the parties in interest, shall hereafter be determined, fixed, allowed and settled by this Court, and all questions not hereby disposed of are reserved for future adjudication, including all claims pending or

hereafter made against the property sold originating under the Receiver, the defendant or its predecessors in title. Any party to this cause and any party who has intervened in this cause, may at any time apply to this Court for further relief at the foot of this order.

Jos. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 102] The assignment referred to in Sec. second of the decree of confirmation as made by Messrs Bailie and Moore conformed to the recital thereof and the deed approved by the Court to be executed substantially in the form as set out in Sec. III Second sub-section of the decree and exhibited to the Court as in the decree stated were in form as therein referred to and covered the property as set out in Section II of the decree of confirmation of sale.

It is agreed that those documents are sufficiently stated by this statement. It is further agreed that on Nov. 30th, 1922, the whole railroad, and all of the assets and the properties of the sold out International and Great Northern Railway Company and of the Receiver thereof, or held by him were turned over and delivered to the I.-G. N. R. R. Co., and it then went into action as a public carrier.

The foregoing is submitted as a true, complete, simple, and condensed statement of all matters introduced in evidene in this case, and the Court is respectfully petitioned to approve the same, and notice is given counsel of the Defendants of the filing thereof.

Central Union Trust Company of New York, Plaintiff and Appellant, by H. M. Garwood, Sam'l B. Dabney, Its Solicitors. Larkin, Rathbone and Perry, Baker, Botts, Parker & Garwood, Dabney, King, King and Woodul, Counsel.

[fol. 103] The within and foregoing statement of facts is hereby agreed to.

Nelson Phillips, W. C. Campbell, A. G. Greenwood, Solicitors for Defendants Except I. & G. N. Ry. Co. Phillips & Townsend, W. C. Campbell, Campbell, Greenwood & Barton, Seagler & Pickett, Counsel for Defendants Except I. & G. N. Ry. Co. Thomas J. Freeman, Solicitor for International and Great Northern Railway Company.

ORDER SETTLING STATEMENT OF EVIDENCE

Approved, ordered filed as part of the record of this case, Sept. 6, 1923.

W. Lee Estes, Judge.

[File endorsement omitted.]

[fol. 104] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF TEXAS

[Title omitted]

OPINION OF THE COURT—Filed August 11, 1923

The plaintiff herein, a corporation of New York, is the trustee in a mortgage executed about the year 1911 by the International & Great Northern Railway Company and as such brought a suit in this court, numbered 49, the purpose of which was to secure the appointment of a receiver to operate the railroad and to foreclose the mortgage. A final judgment has been rendered in that case accomplishing the purpose of the proceeding and confirming the sale that was made in connection with the foreclosure.

Under the provisions of the judgment, the railroad has been delivered to the purchaser—a corporation organized under the name of the International-Great Northern Railroad Company, which Company is now operating it. But jurisdiction was reserved to determine matters that were pending or that might subsequently arise from the operation or control of the property by the receivers. It is not necessary to recount the details of the order in this regard. It is sufficient to say that the recitals are very full, and are ample to sustain jurisdiction of any questions affecting the title to the property or that are germane to the purpose or the substance of the suit.

Before the final decree was rendered, the plaintiff instituted this suit against the railway (defendant in the original suit) against Anderson County, the city of Palestine and a number of citizens residing there. The allegations, as regards the questions now being considered, have reference to alleged claims that the defendants, other than the railroad company, are making respecting the permanent location in the city of Palestine of the general offices and shops [fol. 105] of the road. These claims, as recited in the bill, are to the effect that certain contracts for the location of the general offices and shops at Palestine were made between the predecessors in title of the railroad and some citizens of Anderson County that have the effect to make the provisions of the Texas statute which forbids the removal of the general offices and shops of railroads that have been aided by an issue of bonds in consideration of their location, applicable to and enforcible against prospective purchasers of the road. The history of the railroad, the details of the alleged contracts, the claims of the defendant city and county, the substance of previous litigation respecting same and the denials and defenses of the plaintiff, are set forth in the bill with the prayer that the defendants be enjoined from asserting such claims in the future, that the said claims be held of no effect, and that the property affected by the foreclosure be released from the burden and cloud occasioned thereby.

The suit is represented to be for the benefit of the plaintiff's trust and of any purchaser under the decree of foreclosure, and for the specific purpose of determining whether the alleged claims of the city

and county have any basis in fact, and if they have not, then for the purpose of eliminating them. The point is made that they constitute a burden and servitude upon the property which the court administering the property can, if the facts justify, remove. Jurisdiction is therefore based, not only on the diversity of citizenship between the parties, but also upon the relation of the claims to the matters involved in the original suit.

The defendants have filed a motion to dismiss the proceeding upon the ground that the court is without jurisdiction, in that the bill discloses that the plaintiff is a resident of New York and the defendants all reside in the Eastern Federal District of Texas. The motion is therefore in the nature of a plea of privilege by the defendants to be sued in the district in which they reside, and is based upon disclosures in the bill itself, to-wit, that jurisdiction is invoked because the parties reside in different states, and neither party resides in this district of Texas.

The venue statute relating to federal courts provides that suits shall be filed in the district where the defendants reside. (5 Fed. Stat. Ann. 486). There is no controversy respecting the fact that the plaintiff resides in New York and the defendants in the Eastern [fol. 196] Federal District of Texas. So the motion is well taken, unless the privilege has been waived, as the plaintiff contends, or unless the proceeding is so dependant on or involved in the original suit as to be in *said* of it, or, what is the same thing, ancillary to it.

The claim that the venue is waived rests, first, on the form of the motion, which does not contain the usual clause specially limiting the appearance and disclaiming the purpose to enter a general appearance or submit without protest to the jurisdiction of the court, which the plaintiff claims is necessary in order to avoid a general appearance; and, second, on Equity Rule 29, which, it is contended, contemplates that questions of this character must be presented, not by a motion to dismiss, but in the answer.

The effect of filing the motion therefore, is according to the plaintiff's view, to waive the right to be sued in another district and to enter an appearance in the case.

It does not occur to me that the mere failure to recite in the motion itself that the appearance is a limited one, and that the purpose of the defendant is to test the question of jurisdiction, should have the effect to waive the privileges of the statute. It would be better form, I think, and is the usual practice, to so limit it. All doubt respecting the intention of the pleader would, by such a recital, be removed. But after all, the purpose is the thing to determine. (Southern Pacific Co. vs. Arlington Co., 191 Fed. 110). If it is manifest that it is not the intention to waive the question of venue, and that the pleading is filed for the one purpose of challenging the jurisdiction of the court, the form of the motion becomes largely immaterial. "If an applicant comes into court for the sole avowed purpose of having the service set aside and what he does has no relation to anything else, it is not apparent, as the Supreme Court once observed in an analogous case, why he should be required to

say in words what his act already declares, that this is his sole purpose." (1 Street's Federal Practice, p. 405).

I think it is clear that the intention disclosed in this motion was not to enter an appearance, but on the other hand, was to protest against a trial of the issues outside of the district where the defendants reside. It should therefore be limited to that purpose. As regards the other proposition—that the question of venue cannot, under Rule 29, be raised in a motion to dismiss—that rule provides [fol. 107] that demurrers and pleas are abolished, and that "every defense in point of law arising upon the face of the bill, whether for misjoinder, non-joinder or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore be made by demurrer or plea, shall be made by motion to dismiss or in the answer. * * * Every defense heretofore presentable by plea in bar or abatement shall be made in the answer, and may be separately heard and disposed of before the trial of the principal case, in the discretion of the court."

The plaintiff has cited no authorities that seem to me to decide the question. In the case of Adler Commission Co., 211 Fed. 530, which is referred to in the plaintiff's brief in connection with this point, the motion to dismiss contained three grounds, two of which went to the merits of the case. The decision was that only matters appearing on the face of the bill can be urged in such a motion, and that the question of jurisdiction or venue was waived by pleading the merits or defenses. In the case of Moore, 209 U. S. 470, an amended petition and a formal agreement to submit to the jurisdiction of the court was in the record. The decision was that such procedure constituted—and indeed the facts showed it to be intended as an appearance, and jurisdiction to try the case in such a situation, the parties residing in different states, was held to exist.

While the verbiage of the rule may permit the construction for which the plaintiff contends—that the word "whether" is used as a word of limitation and is designed to limit the defenses in a motion to dismiss to misjoinder, non-joinder and insufficiency of fact—yet the language also admits of a broader interpretation which is obviously more consistent with the purposes of the rule and its usual application by the courts.

Even before this rule was adopted, the defect of jurisdiction, if apparent on the face of the bill, could be raised by demurrer or by a motion to dismiss. (Municipal Co. vs. Gardiner, 62 Fed. 954.) The rule abolished demurrers, and, as I understand it, permitted every defense involving a point of law arising on the face of the bill to be raised by a motion to dismiss. If the defense appears on the [fol. 108] face of the bill there is no issue respecting it. "The case is not one where a plea in abatement is required to raise the question of jurisdiction." The citizenship, in that state of affairs, is averred in the bill of complaint, and the defect in jurisdiction is apparent. So the plaintiff is in error when he says: "If he came attacking the venue by an answer (as is the only way to attack it), we then will reply under Rules 33 or 34 or both, if necessary, completely showing the jurisdiction of this Court." Since the venue is shown by the

bill itself to be in the Eastern District of Texas, no reply should be made. It would be unnecessary.

Practically all of the authorities that I have examined seem to hold in accordance with this view, and to have so established the procedure. Foster, Montgomery, Whitehouse and Simkins, in their books relating to federal procedure, announce the rule to be substantially that where the want of residence essential to jurisdiction appears upon the plaintiff's pleading, objection may be raised by a motion to dismiss. See also Coal Co. vs. Blatchford, 11 Wall. 172; Tice vs. Hurley, 145 Fed. 391.

This leaves for consideration the question of whether this suit is involved in or so related to the original proceeding pending in this court as to bring it within the class of matters over which jurisdiction, by the terms of the decree of confirmation, is retained; or, irrespective of the recitals in the decree, whether it involves a claim that constitutes a burden or servitude upon the property being administered by the court and conveyed by its processes to a purchaser, jurisdiction to determine the merit of which, by well established principles, is in this court alone.

It is well settled that a court administering an estate gathers to itself jurisdiction to determine all questions that have to do with the integrity or control of such estate. The language in the brief of the plaintiff expresses the thought. "Jurisdiction attaches because the court has possession of the res, and because, having possession, no one can litigate rights over that thing or limits of its use and enjoyment, except in the court then having possession." Any other rule would result in confusion.

The court in charge of the property is the only tribunal that could give adequate relief respecting such matters to all concerned. Juris-
[fol. 109] diction, in such cases, is based upon control of the matter involved in the original suit, and has no reference to the citizenship of the parties.

The original suit herein, cause Number 49 was designed to foreclose the mortgage of which the plaintiff was trustee and that purpose has been accomplished. It was obviously proper to require all parties having claims against the receiver to intervene in that suit or be foreclosed. "Those charging the property as junior in right, in order to clear out their equities of redemption, and those claiming to be prior in right, in order to extinguish, limit or ascertain their priorities * * * the mulitude of claimants, prior or punior, claiming burdens, conditions, limitations, liens, charges or what not, as running with the property," should all be disposed of either by intervention in the original suit or by ancillary proceedings in this Court.

"But a decree of foreclosure does not render the purchaser and property foreclosed sacrosanct" or give jurisdiction over questions respecting duties that the company operating the property owes to the public. The meaning of the Texas statute is no longer an open question. Its terms have been considered both by the Supreme Court of the State and by the Supreme Court of the United States. (10[illegible] Tex. 60, 246 U. S. 424.) Its substance is to require a railroad

poration as a condition of its corporate existence and the enjoyment of corporate privileges, to maintain its general offices and machine shops at the place where its predecessor, for a valuable consideration, established them. It does not present a question of a lien or servitude upon the property, as those terms are used in the terminology of the law. It is rather a liability on the part of a new concern "to perform the public duties imposed by law upon the old corporation." It is conceivable—and in this case it is contended by the plaintiff—that the maintainance of the shops in Palestine involves increased operating expense and, in that sense substantial loss and burden to the company. But even so, the obligation must be discharged, because if the contracts were made, the duty to maintain them there was assumed as a condition to the use of corporate authority and as a limitation on the right to operate the property.

The foreclosure and sale in this court could not possibly carry [fol. 110] immunity from such an obligation.

If the contracts were not made, then the determination of the issue of fact in this regard has no proper place, it seems to me, in a suit to foreclose the mortgage.

It presents a controversy between the defendants and the new company, which cannot be heard in this court except by the defendants' consent. To hold otherwise would extend the doctrine of ancillary jurisdiction beyond precedent, and avoid substantial rights given to all defendants by the statute.

So I have concluded that the motion of the defendants to dismiss the case should be sustained, and it is so ordered.

W. Lee Estes, Judge. Texarkana, Texas, August 9, 1923.

[File endorsement omitted.]

[fol. 111] DECREE DISMISSING SUIT—Filed August 29, 1923

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF TEXAS

[Title omitted]

DECREE—Filed August 29, 1923

This cause came on to be heard at this term and was argued by counsel and thereupon upon consideration thereof on the 29th day of August 1923, the Honorable W. L. Estes, District Judge, sitting in the trial of this cause, the Honorable Joe C. Hutcheson, Jr., the regular presiding Judge of this Court, having theretofore certified his disqualification to sit or act in this cause, and the Honorable W. L. Estes, District Judge of the Eastern District of Texas, having

been regularly and legally designated to hear and determine said cause, as provided by law, announced his decision herein and caused minute entry thereof to be made as follows: "This cause having heretofore been submitted to the Court for its consideration and decision on the motion of defendants, Anderson County Texas, the City of Palestine, Texas, Geo. A. Wright, A. L. Bowers, Jno. R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewall, Jno. M. Colley and P. H. Hughes, to dismiss the bill of complaint herein, the Court having duly considered the same and being fully advised in the premises, now announces his conclusions thereon, and it is accordingly ordered that said motion of said defendants to dismiss the Bill of Complaint, be and the same hereby is granted," to which conclusions and order the plaintiff then and there excepted.

It is, therefore, ordered, adjudged and decreed as follows viz:— That said defendants' motion to dismiss be sustained, and that this cause be and hereby is dismissed, and that said defendants recover from plaintiff their costs herein expended, to which action of the Court the Plaintiff then and there, in open Court duly excepted.

W. Lee Estes, District Judge Presiding. Houston, Texas Aug. 29, 1923.

[fol. 112] [File endorsement omitted.]

[fol. 113] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

[Title omitted]

NOTICE OF APPEAL AND PETITION FOR ALLOWANCE THEREOF—Filed Aug. 29, 1923

To the Honorable W. Lee Estes, judge sitting in this case:

Now comes the Central Union Trust Company of New York, Plaintiff and the court having here now signed its decree in open court, dismissing this suit, the plaintiff excepts thereto, and now here, in open court, represents that certain errors were committed to its prejudice and presents its Assignments of Error, filed herewith, setting out said errors committed to the grievous injury of the plaintiff in that the court has not maintained its jurisdiction, and has not exercised jurisdiction of this case, but held that it has no jurisdiction and in that the court has not held that the question, if any, of jurisdiction, was not waived, all as more specifically appears in the Assignments of Errors herewith.

The plaintiff, your Petitioner, desires to avail itself of the law and practice in such cases by appeal to the Supreme Court of the United States and gives notice thereof.

Wherefore, your Petitioner prays that an appeal be allowed for the removal of this cause into the Supreme Court of the United

States, to the end that the errors committed in dismissing this case, and in refusing to take jurisdiction thereof, and the proceedings in this case may be duly corrected, and full and speedy justice be done to the parties and prays that the Transcript of the Record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States and that a bond be approved to operate as a supersedeas as provided by law, and that all such other relief as may be due be granted Petitioner and that your Honor [fol. 114] furthermore make a certificate as provided by law, that no other question has been decided by you, or involved in your decree, except the holding that *that* this court has no jurisdiction of this case.

Central Union Trust Company of New York, by H. M. Garwood and Sam'l B. Dabney, Its Solicitors. Larkin, Rathbone and Perry, Baker, Botts, Parker & Garwood, Dabney, King, King and Woodul, Counsel.

[File endorsement omitted.]

[fol. 115] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed August 29, 1923

Now comes the Appellant, the Central Union Trust Company of New York, and respectfully shows, that in the above mentioned cause, and in the proceedings, decision and final decree thereof by this Court, dismissing this case, there has been manifest error to the grievous injury and wrong of Appellant and to its prejudice and against its rights in the following particulars, all as is apparent upon the record.

I. The Court erred in holding that the Objection to the venue in this case was not waived by those defendants presenting the motion to dismiss, in that the motion was not limited to a special appearance for the purpose of dismissal, and in that the motion was made without protest that it was a special appearance, whereby the appearance was for all purposes and any question of venue waived.

II. The court erred in dismissing this suit, and in not holding that the defendants presenting the motion to dismiss had not waived any ground for the dismissal of the suit; because the point of venue attempted to be presented by said defendants, that is, by all of the defendants, except the International & Great Northern Railway Company, was presented by a motion to dismiss; whereas, under Rule 29 of Equity, it could not have been presented by a motion to dismiss, but only could have been presented by an answer, the point being claimed to be one of venue and not for misjoinder, non-joinder or insufficiency of fact to constitute a valid cause of action in equity.

III. The Court erred in sustaining the motion to dismiss, filed by [fol. 116] all of the defendants herein, except the International & Great Northern Railway Company, and in dismissing this case; because said defendants filing this motion raised the merits of the case in their alleged motion, to wit: That the domicile of the International & Great Northern Railway Company was in the City of Palestine, in Anderson County, in the Eastern District of Texas and so made by a final judgment in court; whereby it was contended and presented in the motion that the International & Great Northern Railway Company was not a resident of the Southern District of Texas, but was, as to the plaintiff herein, a resident of the Eastern District of Texas, as established by such alleged decree; this being one of the principal points of the case, and it being denied by the plaintiff that any such decree was binding on it; whereby, by presenting such point the merits of the case were presented and said motion was waived, even were it in proper form in other particulars, which is not admitted but denied.

IV. The Court erred in sustaining the alleged motion to dismiss, and in directing and decreeing that this case be dismissed; in that the motion to dismiss was presented, not by all of the defendants, but by the defendants, except the International & Great Northern Railway Company, which Railway Company had filed an appearance in this case and accepted service, and did not protest the jurisdiction, whereby the court acquired jurisdiction, and whereby the court acquired jurisdiction as to such defendant Railway separately as well as to all of the defendants.

V. The court erred in sustaining the motion to dismiss, and in decreeing the dismissal of this case; because this suit was ancillary in aid of the decree of foreclosure in the case of Central Union Trust Company of New York vs. International & Great Northern Railway Company et al., which decree was entered on May 7th, 1915, and because this suit was filed in this court before the sale of the properties of the International & Great Northern Railway Company under the decree of foreclosure, and while the properties were in the possession of the court; whereby this court had jurisdiction, and having jurisdiction, the jurisdiction remained, whereby this court was the proper forum for this suit.

[fol. 117] VI. The Court erred in sustaining the motion to dismiss, and in dismissing this case; because this court in the suit of the Central Union Trust Company of New York vs. International & Great Northern Railway Company et al., No. 49 in Equity, in this court, to which this suit was ancillary, had the power to reserve as it did; in the decree of foreclosure of the properties of the International & Great Northern Railway Company entered May 17th, 1915; and in the decree of confirmation of sale entered August 10th, 1922, after the institution of this suit, as it did, the exclusive jurisdiction of this suit; and because, by amendment to the pleading herein, after the confirmation of sale, such reservations in the decree of confirmation were set out and plead and drawn to the

attention of this court, wherein jurisdiction of this suit was directly reserved, and because this suit was brought before the court has sold the property or released it; whereby even if a public duty was involved, this court had complete jurisdiction of said cause.

VII. The Court erred in holding that it did not have jurisdiction, and in dismissing this suit on the motion of all of the defendants, except the Railway Company; because by the decree of foreclosure in No. 49 in Equity in this court, entered June 17th 1915, this court had expressly reserved jurisdiction of this case, and of any such case as this.

VIII. The Court erred in dismissing this case on the motion of all of the defendants, except the Railway Company; because in Section 9 of the decree of confirmation of sale made after this suit was instituted and entertained by this court, and set up and drawn to the attention of this court, in the amendment to the pleading expressly reserved jurisdiction of "suits now pending in this court in this cause, or affecting the property above dealt with," and stated that the same were "respectively reserved by this court for further hearing and determination;" and because this court declared in such reservation that "all questions not hereby disposed of are reserved for future adjudication including all claims pending, or hereafter made against [fol. 118] the property sold originating under the Receiver, the defendant or its predecessor in title."

IX. The court erred in dismissing this case upon the motion of all of the defendants, except the International & Great Northern Railway Company, because this suit had been instituted before the sale of the property and while it was in the possession of this court, and had been entertained by this Court; and because, in the ninth section of the decree of confirmation of sale of the properties, pleaded by an amendment to the pleading after the decree of confirmation was entered, this court expressly reserved jurisdiction of "suits now pending in this court in this cause." The words "this cause" referring to No. 49 in Equity, being the foreclosure case, to which this suit is ancillary, styled Central Union Trust Company of New York vs. International & Great Northern Railway Company et al.; whereby this court contracted with the plaintiff and with the purchasers under the decree of foreclosure then confirmed, to maintain the jurisdiction of this particular case, and whereon the sale was made and consummated on the face of such decree and contract of the court, all as appears in the record and proceedings in this case.

X. The court erred in sustaining the motion to dismiss this case filed by all the defendants herein, except said Railway Company; because this suit was instituted and entertained by the court while all the properties remained in the possession of the court and because this court had not "finished the case" and had not "given up possession and control before this suit was brought:" and because there was not an "absence of action on the part of the court of the United States" before the sold out property was turned over to the purchaser, which was done long after the institution of this suit, but on the

contrary this "the court of the United States" had acted and entertained this suit and reserved jurisdiction thereon before the turnover of the property; whereby although even if a public duty be involved, the jurisdiction had attached and remained.

Wherefore, the Appellant prays that the judgment of this court in this case be reversed, and that such further orders and proceedings be had as law and justice may require, and that this cause be remanded, and such relief given the Appellant as may be its due.

Very respectfully, Central Union Trust Company of New [fol. 119] York, by H. M. Garwood and Sam'l B. Dabney, Its Solicitors. Larkin, Rathbone & Perry, Baker, Botts, Parker & Garwood, Dabney, King, King & Woodul, Counsel. Attest: W. Lee Estes, Judge.

[File endorsement omitted.]

[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE ALLOWING APPEAL—Filed August 29, 1923

This day this case came on in open court and all the parties were present, both plaintiff and defendants, by their respective counsel and solicitors of record.

And in open court a decree was entered dismissing this suit, being the final decree therein. Thereupon the plaintiff, in open court, having excepted to the decree, gave notice of appeal to the Supreme Court of the United States, exhibited and filed its Assignments of Errors, now identified by my signature, and moved the court to allow this appeal and fix the amount of the bond for the appeal, conditioned as required by law; therefore, this court does now allow the appeal and it is ordered that the appeal is granted, upon the plaintiff and Appellant giving bond as required by law in the sum of Five Thousand ($5,000.00) Dollars, (*$5,000.00*) and the Appellant here now presenting such bond, conditioned and as required by law, with proper sureties, the court does here now approve the same and order it to be filed. And of all of the above the defendants then and there in open court took notice. The Plaintiff excepts to the refusal of the Court to grant a supersedeas.

Done in open court this 29 day of August A. D. 1923.

W. Lee Estes, Judge.

[File endorsement omitted.]

[fols. 121-123] BOND ON APPEAL FOR $5,000—Approved and filed August 29, 1923; omitted in printing

[fol. 124] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

[Title omitted]

CERTIFICATE OF QUESTION OF JURISDICTION—Filed August 29, 1923

This cause came on to be heard upon a motion to dismiss, filed by the Defendants, Anderson County, The City of Palestine, Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes, all of whom were brought before the court by due Process, and the Court having considered the motion, granted it and this day has decreed that the suit of the Plaintiff be dismissed on the ground that the Court was without jurisdiction.

And now, on motion of the Plaintiff, during the same day and term at which the final decree of dismissal was made and entered, this certificate is granted, to wit:

The Plaintiff filed its bill to perpetually enjoin the defendants from asserting their claims that the general offices and shops of the International and Great Northern Railway Company, or of any purchaser thereof under the decree of foreclosure sale entered in this court operating said Railway and its property, shall be kept in Palestine or Anderson County, and as in the bill set out. This suit was brought before the sale of the property made in No. 49 in Equity mentioned below. The plaintiff alleged that it brought this suit in aid of the decree of foreclosure in this court, towit, vs. the International and Great Northern Railway Company et al. No. 49 in Equity herein; and by an amended pleading, filed after the decree of confirmation of sale of the properties of said railway, claimed that this Court had in that decree again reserved jurisdiction hereof.

On the pleadings of the Plaintiff as well as the motion to dismiss, it appeared that the Plaintiff was a citizen of and domiciled in New York State and the defendants citizens of and domiciled in the East-[fol. 125] ern District of Texas except that the International and Great Northern Railway Company was alleged by the Plaintiff to be domiciled by its charter in Houston in Harris County, Texas, by the other defendants to be domiciled in Palestine, Anderson County, Texas, in the Eastern District, but the Court being of the opinion that said defendants have filed the motion to dismiss in proper form, and that no question of lien or servitude upon the property was presented, but rather a question of a liability on the part of a new concern to perform the public duties imposed by law upon the old corporation and that this should be a controversy between the said defendants and the new company, buying the property at the sale, which cannot be heard in this court, except by the consent of said defendants, and that to hold otherwise would unduly extend the doctrine to ancillary jurisdiction, the Court was of the opinion that there was no jurisdiction; and made the decree of dismissal.

Now therefore, it is certified that the question of jurisdiction of this Court upon the grounds hereinbefore stated was properly pre-

sented by a motion to dismiss, namely, that there was no jurisdiction of this case.

It is now certified that the only question upon the pleadings and process and record, for the decision of the Supreme Court of the United States involved in the proceedings had, was a question of jurisdiction and that the International and Great Northern Railway Company filed its appearance, as a defendant, but did not further appear, but that the Court held that there was no jursdiction of it, or of any other of the defendants herein.

The only question decided by the Court was that it did not have jurisdiction.

Now therefore, it is certified that the question of jurisdiction of this Court, upon the ground stated, was the only issue upon which this case was decided, and on which the final decree was based.

I found as stated above therefore that it was the duty of the Court to dismiss the bill which was accordingly done. I further certify that it is the only question, being one of law, upon the pleadings and process and record for the decision of the Supreme Court of the United States as appears above, to wit: the jurisdictional question, and that this certificate is granted at the term and on the day [fol. 126] on which the judgment in the cause was entered. In open Court Houston, August 29 A. D. 1923.

W. Lee Estes, United States District Judge. Attest: L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, by J. L. Sexton, Deputy. (Seal.)

[File endorsement omitted.]

[fol. 127] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAYER FOR REVERSAL—Filed August 29, 1923

Now comes the Central Union Trust Company of New York, Appellant, and prays for a reversal of the decree of the District Court of the United States for the Southern District of Texas, rendered August 29, 1923.

This Appellant has applied for and obtained an appeal to the Supreme Court of the United States to review and correct said decree of the District Court of the United States of the Southern District of Texas, sitting at Houston.

Central Union Trust Company of New York, Appellant, by H. M. Garwood and Sam'l B. Dabney, Solicitors of Record. Larkin, Rathbone & Perry, Baker, Botts, Parker & Garwood, Dabney, King, King & Woodul, Counsel.

[File endorsement omitted.]

[fol. 128] UNITED STATES OF AMERICA,
Southern District of Texas:

CLERK'S CERTIFICATE

I, L. C. Masterson, clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignments of error and all proceedings had in the case, as called for in the præcipe for transcript on page 1 of said transcript, in cause No. 189 on the Equity Docket of said Court, entitled [title omitted], as the same now appears on file and of record in my office.

To certify which witness my hand and the Seal of said Court at Houston, in said District, this the 11th day of September A. D. 1923.

L. C. Masterson, Clerk United States District Court, Southern District of Texas, by S. F. Cunningham, Deputy. (Seal of United States District Court, Southern District Texas.)

Endorsed on cover: File No. 29,882. Southern Texas D. C. U. S. Term No. 572. Central Union Trust Company of New York, appellant, vs. Anderson County, Texas; The City of Palestine, Texas; George A. Wright, et al. Filed September 24th, 1923. File No. 29,882.

(1748)

No. 178

IN THE

Supreme Court of the United States

October Term 1923

CENTRAL UNION TRUST COMPANY OF NEW YORK, *Appellant*,

vs.

ANDERSON COUNTY, THE CITY OF PALESTINE, TEXAS, GEORGE A. WRIGHT, ET AL., *Appellees*.

Appeal from the District Court of the United States for the Southern District of Texas.

BRIEF FOR APPELLANT

By

S. B. DARNEY,
H. M. GARWOOD,
Solicitors for Appellant.

LASKER, RATHBONE & PERRY,
BAKER, BOTTS, PARKER & GARWOOD,
Of Counsel.

A. S. KOSH PRINTING COMPANY, HOUSTON

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ALPHABETICAL LIST OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term 1923

CENTRAL UNION TRUST COMPANY OF NEW YORK, *Appellant*,

vs.

ANDERSON COUNTY, THE CITY OF PALESTINE, TEXAS, GEORGE A. WRIGHT, ET AL., *Appellees*.

No. 572

Appeal from the District Court of the United States for the Southern District of Texas.

BRIEF FOR APPELLANT

This suit originated in the District Court of the United States for the Southern District of Texas, Houston Division.

The bill of complaint was filed June 5, 1922, as an ancillary or dependent bill in Cause No. 49 in Equity, Central Union Trust Company of New York, Plaintiff, v. International & Great Northern Railway Company et al., Defendants, which original suit was a bill by the Central Union Trust Company of New York, mortgage trus-

tee, to foreclose a mortgage upon the properties of the International & Great Northern Railway Company.

The bill for foreclosure in said cause was filed on August 10, 1914, and receivers were appointed, who went into possession and operation of the properties under orders of the court. On May 17, 1915, the court entered its decree of foreclosure on all the properties of the railway company, foreclosing the mortgage sued upon and decreeing that if the defendant railway company did not pay $12,908,461.06 with interest at the rate of six per cent. from May 17, 1915, then the properties should be sold by Special Master.

After the filing of the ancillary bill herein involved, the Special Master sold the properties in accordance with the decree to Earle Bailie and Maurice T. Moore for $5,000,000.00, certain obligations therein mentioned and other obligations as might be determined by the court thereafter. The Special Master made report to the court and thereafter the purchasers having assigned their bid and right to purchase, the court, on August 10, 1922, confirmed the sale and directed the Master, the Receiver and the defendant, railway company, and the foreclosing complainant, Central Trust Company of New York, under its changed name of Central Union Trust Company of New York, to execute a deed to a corporation to be termed International-Great Northern Railroad Company, upon the terms and conditions as set out in said decree.

The Central Union Trust Company of New York, successor of the original complainant, Central Trust Company of New York, the foreclosed properties being still in the possession of the court under full reservations, as hereinafter more fully shown, on June 5, 1922,

filed as a part of the original foreclosure suit its ancillary or dependent bill in aid of the foreclosure against Anderson County, the City of Palestine, Geo. A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes and the International & Great Northern Railway Company, alleging that all the defendants in the ancillary bill, except the International & Great Northern Railway Company, were asserting that in 1872 and 1875 contracts were made with the remote predecessors in interest of the International & Great Northern Railway Company, the defendant in the original suit herein, for the location of the general offices and shops and roundhouses of such remote predecessors in interest at Palestine, in Anderson County, and that by virtue of the terms of an act of the Legislature of the State of Texas of 1889, amended in 1899, and now Articles 6423, 6424 and 6425, Revised Statutes of said State, these contracts operated, by virtue of the terms of said act, to forever require the original contracting companies and all successors in title to the railway properties to forever maintain the principal offices, roundhouses and shops of whatever railway company should own the properties at Palestine, in the County of Anderson, in said State of Texas.

The ancillary bill further alleged that the defendants, other than the International & Great Northern Railway Company, in 1912 sued said International & Great Northern Railway Company in the State court in Anderson County upon said alleged contracts and under said statutes, and, the cause having been transferred to the District Court of Cherokee County, obtained a decree against the International & Great Northern Rail-

way Company on January 17, 1914, to the effect that it should forever keep and maintain the general offices, machine shops and roundhouses for the operation of the railway in Palestine, and that it be perpetually enjoined and restrained from maintaining the general offices of its executives at any other place; that this decree became final in 1918, and these defendants, plaintiffs in said cause, allege and insist that said decree is binding upon any purchaser of the property, and declare that they will enforce it by suit in other forums under the threat of penalties prescribed by the statute, if not observed by any purchaser under the decree of foreclosure which the court had already entered in the original suit of complainant in said equity cause No. 49, and that the defendants claim that that decree is *res adjudicata* against Central Union Trust Company, of New York, plaintiff, and any purchaser under the decree of foreclosure which had been entered in said cause No. 49, or which might be hereafter entered, although plaintiff's foreclosure mortgage antedated said suit in the State District Court, and although plaintiff was never made a party to that suit, the defendants having full notice of the mortgage.

This plaintiff, the foreclosing mortgagee in the original suit, alleged in this its ancillary bill, that as a matter of fact said contracts of 1872 and 1875 were never made and never became binding, if made, upon the successors of the corporations with whom they were alleged originally to have been made, and never became binding upon the properties and were not binding upon complainant, and did not bind the purchaser under the foreclosure sale in said original cause No. 49.

Complainant further alleged that, inasmuch as its

said mortgage which was foreclosed had been sued upon in cause No. 49 and was executed long prior to the institution of said suit in the State court to enforce the alleged obligations of said contracts, and at the time of the institution of said suit said properties were in the possession of the court through its receivers, and this plaintiff was never made a party to that suit, that the principles neither of *res adjudicata* nor former judgment had any operation against this plaintiff, and that it had full right to contest the actual existence of said contracts and their binding force upon the properties or against the purchaser under its foreclosure sale.

It was further alleged by complainant in its ancillary bill that the court in its original decree of foreclosure in the original cause fully reserved all questions not disposed of in the decree for future adjudication and fully reserved the right to dispose of all claims and charges against the foreclosed properties, and that in its order of August 10, 1922, confirming the sale, the court reserved all questions relating to amounts of compensation, charges, allowances, costs, disbursements and expenses referred to in the final decree and to suits "now pending in the court" affecting the property for further hearing and determination and that under these reservations no other court than the District Court of the United States for the Southern District of Texas had power or jurisdiction to hear or determine the issues tendered in said ancillary bill.

The defendants Anderson County, the City of Palestine and the individual residents of said county, filed a plea to the jurisdiction of the court. The plea to the jurisdiction was sustained and the bill dismissed. The court thereupon certified that the only question upon

the pleading, process and record was a question of jurisdiction; that the court held there was no jurisdiction of any of the defendants and that the only question decided by the court was that it did not have jurisdiction; that the question of jurisdiction was the only issue upon which the case was decided and upon which the final decree was based.

Whereupon appeal was allowed and prosecuted to this court under Section 238 of the Judicial Code.

W. H. Hoffman, D. A. Kelley, Robert H. Rogers et al., v. Peter McClelland, Junior, et al., decided by this court April 21, 1924. (Sup. Ct. Rep., Vol. 44, No. 14, 407.)

The following specifications of error were filed:

"V. The court erred in sustaining the motion to dismiss, and in decreeing the dismissal of this cause; because this suit was ancillary in aid of the decree of foreclosure in the case of Central Union Trust Company of New York v. International & Great Northern Railway Company et al., which decree was entered on May 17, 1915, and because this suit was filed in this court before the sale of the properties of the International & Great Northern Railway Company under the decree of foreclosure, and while the properties were in the possession of the court; whereby this court had jurisdiction, and having jurisdiction, the jurisdiction remained, whereby this court was the proper forum for this suit.

"VI. The court erred in sustaining the motion to dismiss, and in dismissing this cause; because this court in the suit of the Central Union Trust Company of New York v. International & Great Northern Railway Company et al., No. 49 in Equity, in this court, to which this suit was ancillary, had the power to reserve as it did, in the

decree of foreclosure of the properties of the International & Great Northern Railway Company entered May 17, 1915; and in the decree of confirmation of sale entered August 10th, 1922, after the institution of this suit, as it did, the exclusive jurisdiction of this suit; and because, by amendment to the pleading herein, after the confirmation of sale, such reservations in the decree of confirmation were set out and plead and drawn to the attention of this court, wherein jurisdiction of this suit was directly reserved, and because this suit was brought before the court had sold the property or released it; whereby even if a public duty was involved, this court had complete jurisdiction of said cause.

"VII. The court erred in holding that it did not have jurisdiction, and in dismissing this suit on the motion of all of the defendants, except the railway company; because by the decree of foreclosure in No. 49 in Equity in this court, entered May 17th, 1915, this court had expressly reserved jurisdiction of this case, and of any such case as this.

"VIII. The court erred in dismissing this case on the motion of all of the defendants, except the railway company; because in Section 9 of the decree of confirmation of sale made after this suit was instituted and entertained by this court, and set up and drawn to the attention of this court, in the amendment to the pleading expressly reserved jurisdiction of 'suits now pending in this court in this cause, or affecting the property above dealt with,' and stated that the same were 'respectively reserved by this court for further hearing and determination;' and because this court declared in such reservation that 'all questions not hereby disposed of are reserved for future adjudication including all claims pending, or hereafter made against the property sold originating under the Receiver, the defendant or its predecessor in title.'

"IX. The court erred in dismissing this case

upon the motion of all of the defendants, except the International & Great Northern Railway Company, because this suit had been instituted before the sale of the property and while it was in the possession of this court, and had been entertained by this court; and because, in the ninth section of the decree of confirmation of sale of the properties, pleaded by an amendment to the pleading after the decree of confirmation was entered, this court expressly reserved jurisdiction of 'suits now pending in this court in this cause.' The words 'this cause' referring to No. 49 in Equity, being the foreclosure case, to which this suit is ancillary, styled Central Union Trust Company of New York v. International & Great Northern Railway Company et al.; whereby this court contracted with the plaintiff and with the purchasers under the decree of foreclosure then confirmed, to maintain the jurisdiction of this particular case, and whereon the sale was made and consummated on the face of such decree and contract of the court, all as appears in the record and proceedings in this case.

"X. The court erred in sustaining the motion to dismiss this case filed by all the defendants herein, except said railway company; because this suit was instituted and entertained by the court while all the properties remained in the possession of the court and because this court had not 'finished the case' and had not 'given up possession and control before this suit was brought;' and because there was not an 'absence of action on the part of the court of the United States' before the sold-out property was turned over to the purchaser, which was done long after the institution of this suit, but on the contrary this 'the court of the United States' had acted and entertained this suit and reserved jurisdiction thereon before the turnover of the property; whereby, although even if a public duty be involved, the jurisdiction had attached and remained." (Tr. 68-70.)

FIRST POINT.

The court erred in sustaining the motion to dismiss and dismissing the cause for lack of jurisdiction, because this suit was ancillary and in aid of a decree of foreclosure in the cause of Central Trust Company of New York v. International & Great Northern Railway Company et al., which decree was entered on May 17, 1915, and because this suit was filed in the court of original foreclosure before the sale of the properties of the International & Great Northern Railway Company under the decree of foreclosure and while the properties were in the possession of the court, whereby the court below had jurisdiction, and having jurisdiction, such jurisdiction remained, and said court was the proper forum for the suit.

Statement.

The Central Trust Company of New York, a mortgage trustee, on August 10, 1914, filed its bill against the International & Great Northern Railway Company in the District Court of the United States for the Southern District of Texas at Houston in Equity Cause No. 49, in said court, Jas. A. Baker and Cecil A. Lyon being appointed Receivers of the property and assets of said railway company and through such Receivers they were taken into the possession of the court. (Tr. 52.)

On May 17, 1915, the court entered its decree of foreclosure of all the properties of said railway company foreclosing the mortgage sued on of 1911 and decreeing that if the said railway company would not pay $12,908,461.06 with interest at the rate of six per cent. per annum from May 17, 1915, then all the prop-

erties should be sold on request of solicitors of the complainant and providing for the sale of the same by special master appointed by the court.

After the filing of the pending suit on June 5, 1922, the amount decreed being unpaid, the Special Master was duly called on to make the sale and in pursuance of the decree sold all of said properties, including the trackage of 1106 miles of main track and all assets, moneys, and claims whatsoever in the hands of or belonging to the Receiver or in the control of the court. The Special Master made due report to the court of the sale made by him to Earle Bailie and Maurice T. Moore for $5,000,000.00, subject to liens of the existing first mortgage and other and various prior obligations fixed by the court and made prior in right if not prior in time, as well as obligations which the court might thereafter fix. Thereafter said Bailie and Moore assigned their bid and right to purchase the properties and the whole matter was presented to the court and said court did, on August 10, 1922, confirm the sale and direct the Master, the Receiver and the defendant railway company and the foreclosing complainant, Central Trust Company of New York, which at that time had changed its name to its present name of Central Union Trust Company of New York, to execute a deed to a corporation to be termed International-Great Northern Railroad Company, upon the terms and conditions in said decree set out. (Tr. 52-53.)

In the decree of foreclosure of May 17, 1915, it was by the court decreed as follows:

> It was ordered, in the event that the International and Great Northern Railway did not pay $12,908,461.06 decree, with interest thereon at the rate

of six per cent. (6%) per annum from May 17, 1915, then that all of the properties of the railway should be sold under the decree, as therein directed, the sale to be made on the request of the solicitors of the complainant.

Section 15 of the decree was as follows: "All questions not hereby disposed of are reserved for future adjudication." The section followed all other portions of this decree, herein referred to. And it was also provided therein, as follows, commencing in folio 50:

"The court reserved the right to resell the mortgaged property upon such notice as it may direct, at the risk and cost of the purchaser in case the purchaser thereof shall fail or omit to make any payments on account of the purchase price within twenty days after the entry of the order requiring such payment."

It was decreed that the purchaser, in addition to the sum bid, should take the property and receive the deed or deeds therefor, subject to the satisfaction and discharge of any unpaid compensation which shall be allowed by the court to the receivers, and any indebtedness, obligations or liabilities which shall have been contracted or incurred by the Receivers before they shall have delivered possession of the property sold, whether or not represented by certificates, and also any indebtedness or liability contracted or incurred by the defendant railway company in the operation of the mortgaged property prior to the appointment of the Receivers, which is prior in lien or superior in equity to the First Refunding (Foreclosed) Mortgage, and which shall not be paid or satisfied out of the income of the mortgaged property in the hands of the Receivers, upon the court adjudging the case to be prior in lien or superior in equity to the First Refunding Mortgage and directing the payment thereof.

It was further decreed that in the event that

the purchaser, after demand made, shall refuse to pay any before-mentined indebtedness or liability, the person holding the claim therefor, upon twenty days' notice to the purchaser, his successors or assigns, may file his petition in this court to have such claim enforced against the mortgaged property in accordance with the usual practice of this court in relation to claims of a similar character, and such purchaser, his successors or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and any party shall have the right to appeal from any judgment, decree or order made thereon.

It was also decreed that for the purpose of enforcing the foregoing provisions of this decree, "jurisdiction of this cause is retained by this court, and the court reserves the right to retake and resell the mortgaged property in case the purchaser, his successors and assigns, shall fail to comply with any order of the court for the payment of such prior indebtedness or liability within twenty days after the service of a copy of such order, or, if any appeal be taken from any such order within twenty days after service of written notice of the final affirmance of such order upon appeal."

"The Receivers shall, not more than twenty nor less than ten days prior to the date fixed for the sale of the mortgaged property under this decree, file with the clerk of this court:

(a) A statement showing as definitely as practicable all indebtedness, obligations and liabilities contracted or incurred by them then remaining unpaid.

(b) A statement showing as definitely as practicable all indebtedness or liabilities contracted or incurred by the defendant railway company in the operation of the mortgaged property prior to the appointment of the Receivers and which, so far as they are informed, are claimed to be prior in lien

or superior in equity to the First Refunding Mortgage which was foreclosed.

(c) A statement showing as definitely as practicable all outstanding contracts and leases (including all traffic, trackage, terminal crossing, operating and other executory contracts), to which the defendant railway company or the Receivers may be parties, and stating, in the case of contracts and leases to which the defendant railway company is a party, whether such contracts or leases have been assumed or adopted by the Receivers.

Each of such statements shall be advisory only, and nothing therein contained shall be binding upon the purchaser or purchasers at said sale, nor shall such statements constitute ground for the release from any debt because of any representations therein or omission therefrom.

Any such claim for indebtedness or liabilities which shall not have been included in such statement of the Receivers or which shall not have been presented in writing to the Receivers or filed with the clerk of this court prior to the time of delivery of possession of the mortgaged property, shall be presented for allowance and filed within six months after the first publication by the Receivers of a notice to the holders of such claims to present the same for allowance. The Receivers shall publish such notice upon request of the solicitors for the complainant, once a week for four successive weeks in a newspaper of general circulation published in each of the following places, to wit: Laredo, San Antonio, Austin, Palestine, Longview, Fort Worth, Houston and Galveston, in the State of Texas, or in such of said or other papers as the court may by order hereinafter direct; and the Receivers shall also, on or before the date of the last publication of said notice, mail a copy of such notice to each of such holders of said claims as may be known to the Receivers at the last postoffice address known to the Receivers.

Any such claim which shall not be so presented or filed within the period of six months after the publication of such notice shall not be enforcible against the Receivers nor against the mortgaged property nor against any purchaser, his successors or assigns. The purchaser of the mortgaged property, and his successors and assigns, shall have the right to enter his or their appearance in this cause, and he or they or any of the parties to this suit shall have the right to contest any claim, demand or allowance existing at the time of sale and then undetermined and any claim or demand which thereafter may arise or be presented which would be payable by such purchaser, his successors or assigns, or which would be chargeable against the mortgaged property in addition to the amount bid at the sale, and he or they may appeal from any decision relating to any such claim, demand or allowance."

It was shown that the statement had been duly filed and the notices and advertisements duly made, as provided above should be done. (Tr. 53-55.)

The order of the court of date August 10, 1922, confirming the sale of the properties, is as follows:

"In Equity No. 49

Central Union Trust Company of New York, Trustee, Complainant,

against

International and Great Northern Railway Company, et al., Defendants.

Order Confirming Sale.

This cause came on further to be heard on the petition of Earle Bailie and Maurice T. Moore filed July 31, 1922, and on the Special Master's Report of Sale filed July 28, 1922, and on all other proceedings in the above-entitled cause, and was argued by counsel, and thereupon, upon considera-

tion thereof, the court being fully advised, finds, adjudges and decrees as follows:

I. The Special Master appointed in the Final Decree entered May 17, 1915, has fully complied with all the directions in said Final Decree contained as to the sale of the property in and by said Final Decree directed to be sold.

II. The sale of said property held July 28, 1922, was held in all respects as provided by said Final Decree, and at said sale the Special Master sold at public auction to Earle Bailie and Maurice T. Moore the property in and by said Final Decree directed to be sold, to wit:

All railroads, lines or railroads, extensions, branches and bridges, all locomotives, cars, rolling stock and equipment, all premises, leases, leasehold interests, contracts, rights, privileges, franchises and all other property, real, personal and mixed, of every description whatsoever which International and Great Northern Railway Company (hereinafter called the railway company) owned or was entitled to at the time of the execution and delivery of its First Refunding Mortgage, dated August 1, 1911, to Central Trust Company of New York, as Trustee, or which was thereafter acquired by said railway company.

All lands, contracts, equipment, rolling stock and all property of every desceription whatsoever at any time acquired by the Receivers of the said railway company appointed by the United States District Court for the Southern District of Texas by order made and entered on or about August 10, 1914, or by the sole Receiver thereafter appointed, including all balances of cash, credits and income remaining in the hands of the Receivers, or Receiver, after application thereof in accordance with the provisions of said Final Decree.

All and singular the tenements, hereditaments

and appurtenances belonging or in any wise appertaining to the property hereinbefore designated, or any part or parcel thereof, and the reversion and reversions, remainder and remainders, tolls, income, rents, issues and profits thereof, and also all of the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said railway company and of said Receivers, or Receiver, of, in and to the same and any and every part thereof;

as an entirety for the sum of $5,000,000.00, said sum being the highest bid for said property.

III. Said Earle Bailie and Maurice T. Moore have, by their petition filed in this cause, stated that they propose to assign all their right, title and interest in and to the property described in the form of deed hereto annexed and marked Schedule B, sold to them as aforesaid, including their right to receive a deed or deeds or other instruments of transfer and conveyance thereof as provided in said Final Decree, to a corporation organized, or to be organized under the laws of Texas, having power to acquire said property, which they propose shall be named International-Great Northern Railroad Company. Said corporation is hereafter for convenience referred to by said name of International-Great Northern Railroad Company, but if it shall have a different name the provisions of this order respecting International-Great Northern Railroad Company shall apply to said corporation under such different name.

It is therefore ordered, adjudged and decreed as follows:

First: The Special Master's Report of Sale filed herein July 28, 1922, is in all things confirmed and the sale therein reported, namely: the sale to Earle Bailie and Maurice T. Moore of all property in and by the Final Decree in this cause directed to be sold, as an entirety, for the

sum of $5,000,000.00, is made final and absolute, subject, however, to all the terms and conditions of said Final Decree and of this order.

Second: The Special Master is directed, upon the delivery to him of the notes and bonds (or certificate of the complainant representing the same) as in Article Fifth below set out, and upon there being filed in this cause by Earle Bailie and Maurice T. Moore the assignments (in form hereto attached, and marked Schedule A, which is hereby approved), to International-Great Northern Railroad Company of all their right, title and interest in and to the property covered by said sale made by the Special Master, to execute and deliver to International-Great Northern Railroad Company a deed of the property described in the form of deed hereto annexed and marked Schedule B, substantially in said form, which is approved by this court, and the railway company, the Receiver herein, and Central Union Trust Company of New York as trustee under the First Refunding Mortgage, are directed to join with the Special Master in the execution and delivery of a deed to International-Great Northern Railroad Company substantially in the form of said deed Schedule B, or, if said International-Great Northern Railroad Company shall so request, to execute and deliver to said company separate deeds or releases of all their right, title and interest of, in and to the property so conveyed, assigned and transferred to said International-Great Northern Railroad Company by the Special Master.

Third: Upon the production of said deed or deeds, International-Great Northern Railroad Company shall be let into the possession of the property thereby conveyed or transferred, and shall after such delivery of possession, hold, possess and enjoy the property so conveyed and transferred, and every part and parcel thereof, free from any trust or lien imposed thereon by the First Refunding Mortgage and free from all claims, rights, in-

terest or equity of redemption, in or to the same by or of the Railway Company, its successors and assigns, and by or of all persons claiming by, under or through the railway company, subject, however, to all the terms and conditions of said Final Decree and of this order.

Fourth: Upon the delivery to International-Great Northern Railroad Company of the deed to be executed and delivered to it by the Special Master pursuant to the provisions of Article Second hereof, the Receiver shall assign, transfer and deliver to said International-Great Northern Railroad Company all cash, current assets and materials and supplies then in the possession of the Receiver.

Fifth: There shall be credited upon the purchase price of the property sold at said sale, for the Three Year Gold Notes and appurtenant coupons held subject to the order of the Special Master pursuant to the certificate of Central Union Trust Company of New York, deposited by said Earle Bailie and Maurice T. Moore with the Special Master, as stated in his Report of Sale as a pledge that they would make good their bid for said property, such sum as would be paid in cash upon such Gold Notes and coupons out of the proceeds of sale if the whole amount of the purchase price had been paid in cash. In advance of the delivery of said deed or deeds, and within sixty days from the date of the entry of this order, or within such additional period as this court may hereafter by its order or decree permit, said Earle Bailie and Maurice T. Moore or International-Great Northern Railroad Company shall secure the payment of the remainder of the purchase price of the property sold at said sale by turning over to the Special Master to be delivered by him to the clerk of this court, to be cancelled or credited as may be provided by the further order of this court and as provided in said Final Decree, bonds, notes and coupons to at least the following

amounts in addition to the Three Year Gold Notes specified in said certificate of Central Union Trust Company of New York, heretofore deposited with the Special Master:

First Refunding Mortgage Bonds of International and Great Northern Railway Company, $457,000.00 principal amount:

Three Year Gold Notes of International and Great Northern Railway Company, $3,543,000.00 principal amount.

Said bonds, notes and coupons shall be in bearer form or accompanied by proper transfers to the Special Master. In lieu of turning over to the Special Master said bonds and notes, the Special Master shall accept the certificate of the complainant, that it holds subject to his order bonds and notes of the amount and character herein specified. No payment in cash shall be required at this time on account of the purchase price of any of said property nor until this court shall so require, but this court reserves jurisdiction from time to time to require such further payment or payments in cash on account of said purchase price as this court may direct, and this court reserves a paramount lien and charge upon the property to be conveyed, for the payment into this court in cash of the unpaid part of the purchase price.

Sixth: Upon the execution and delivery by the Special Master to International-Great Northern Railroad Company of a deed substantially in the form and of said deed Schedule B hereto and the execution and delivery by International-Great Northern Railroad Company to the Special Master of a counterpart thereof, all obligations and liabilities of Earle Bailie and Maurice T. Moore on account of the purchase of any of the property sold as aforesaid or by reason of their bid at said sale under said Final Decree or the acceptance of said bid, shall forthwith cease and determine and said Earle Bailie and Maurice T.

Moore shall individually be discharged from all such obligations and liabilities.

Seventh: The Three Year Gold Notes and coupons held subject to the order of the Special Master pursuant to the certificate of Central Union Trust Company of New York, deposited by said Earle Bailie and Maurice T. Moore with the Special Master as stated in his said Report of Sale, and the bonds, notes and coupons represented by any certificates of the complainant which may be received by the Special Master pursuant to the provisions of Article Fifth of this order, shall remain with the complainant by whom such bonds, notes and coupons are held, to abide the further order of this court; and when the amounts payable out of the proceeds of sale upon the First Refunding Mortgage Bonds and Three Year Gold Notes and coupons secured respectively by the First Refunding Mortgage foreclosed and by the Trust Agreement enforced in and by the Final Decree in this cause, shall have been determined as in said Final Decree provided, and by the further order of this court, the Special Master shall give notice of the time and place where said bonds, notes and coupons may be presented for payment as in said Final Decree provided, and all such bonds, notes and coupons presented for payment shall be stamped under the court's direction with a notation of the credit or payment thereon of the amount so payable and such bonds, notes and coupons shall thereafter be returned to the respective owners and holders thereof.

Eighth: The court reserves the jurisdiction over the property sold with reference to all claims against the sold-out International & Great Northern Railway Company, which have been litigated or may hereafter be litigated in this or any court, so far as to enforce the payment of any judgments therefor out of the property sold, if the same be not paid within ninety days after the delivery of the deed (herein provided for), to the purchasers

or their assignee, if such judgments are within the protection of the Revised Statutes of Texas, Article 6624 and 6625, or either of such articles, and the payment thereof is hereby made a charge upon the property.

Ninth: All questions relating to amounts of compensation, charges, allowances, costs, disbursements and expenses, referred to in said Final Decree, and to suits now pending in this court in this cause, or affecting the property above dealt with, are hereby respectively reserved by this court for further hearing and determination, and all adjustments and payments to be made, unless agreed upon by the parties in interest, shall hereafter be determined, fixed, allowed and settled by this court, and all questions not hereby disposed of are reserved for future adjudication, including all claims pending or hereafter made against the property sold originating under the Receiver, the defendant or its predecessors in title. Any party to this cause and any party who has intervened in this cause, may at any time apply to this court for further relief at the foot of this order." (Tr. 55-60.)

The assignment referred to in Section Second of the decree of confirmation as above set out as made by Messrs. Bailie and Moore conformed to the recital thereof in the deed approved by the court to be executed substantially as in the form set out in Section III, second sub-section of the decree, and exhibited to the court as in the decree stated were in the form as therein referred to, and covered the property as set out in Section II of the decree of confirmation of sale. (Tr. 60.)

The whole railroad and all of the assets and properties of the sold-out International & Great Northern Railway Company and of the Receiver thereof, or held

by him, were on November 30, 1922, delivered to and turned over to the International-Great Northern Railroad Company, which then began operation of the same as a public carrier. (Tr. 60.)

In 1912, Anderson County, the City of Palestine, George A. Wright, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes filed a suit against the International & Great Northern Railway Company in the District Court of Anderson County, which suit alleged that in 1872 and 1875 contracts were made with the Houston & Great Northern Railroad, subsequently consolidated with the Houston & Great Northern Railroad and with the International & Great Northern Railroad Company, for the location of the general offices, shops and roundhouses of said railway companies at Palestine, in Anderson County, Texas, and that in 1889 the legislature passed an act, amended in 1899, being now Articles 6423-5 of the Revised Statutes of Texas, under which statute where contracts had been made by railroad companies for the location of general offices, shops or roundhouses, in consideration of aid to such railroads, such railroad companies were compelled under the compulsion of severe penalties to perpetually maintain the offices, shops and roundhouses at the points agreed upon and that these contracts as affected by said statute became and were an obligation inherent in the right to operate the railway properties as a public carrier and vested in the property and ran with it as a burden forever, and bound all remote vendees and successors. Decree was asked that the International & Great Northern Railway Company be compelled forever to keep and maintain the general

offices, machine shops and roundhouses for the operation of the railway in Palestine and that it be perpetually enjoined and restrained from keeping or maintaining the offices, shops and roundhouses at any other place whatsoever. (Tr. 3.)

The properties of the International & Great Northern Railway Company were then in the possession of the Federal District Court for the Southern District of Texas through its receivers appointed August 10, 1914, in said Equity Cause No. 49, Central Union Trust Company of New York, Trustee, v. International & Great Northern Railway Company, and the Central Trust Company of New York, the predecessor of the complainant in this cause, was never made a party to that suit. This suit in the State court was transferred to the District Court of Cherokee County, Texas, which rendered judgment as prayed for. The judgment of the District Court of Cherokee County was affirmed by the Court of Civil Appeals, 174 S. W. 305, and writ of error was denied by the Supreme Court. Writ of error was sued out from the judgment of the Court of Civil Appeals to this court on alleged Federal grounds, and this court affirmed the judgment of the Court of Civil Appeals, 246 U. S. 424. The reasoning of the Supreme Court of Texas is found in 106 Texas, 60. It was held that the contracts declared upon as affected by the statute of 1889 constituted a perpetual burden upon the property and franchises of the company and impressed their use with an obligation to maintain the locations provided by the contracts in the hands of all successive owners of the property.

During the continuance of the receivership no effort

was made to enforce this judgment and the properties of the railway being still in the possession of the court, the Central Trust Company of New York under its then name of Central Union Trust Company of New York, plaintiff in the foreclosure suit, the mortgage foreclosed being of date 1911, on June 5, 1922, and prior to the sale under foreclosure, filed its ancillary bill in the original cause, making the plaintiffs in the General Offices suit in the State court defendants in aid of the foreclosure proceedings, alleging that it was never a party to the proceedings against its mortgagor and was not bound by that judgment; that as a matter of fact, no such contracts as set up in the proceedings in the State court to which it was not a party, to wit, the contracts of 1872 and 1875, ever existed; that, therefore, the State statute of 1889 never came into operation; that if such contracts ever existed, they were wholly unauthorized and *ultra vires;* that they had been promptly repudiated and were barred by limitation; that their obligations had been foreclosed by successive foreclosures under mortgages antedating both the contracts and the act of 1889; that by reason of successive mortgage foreclosures specifically set out and purchases at foreclosure sales neither the International & Great Northern Railway Company nor its immediate predecessors in title were bound thereby; that to so hold would impair the obligation of valid contracts and that the statute of 1889, if held to have the effect claimed, was invalid as impairing the obligation of contracts and imposing an added obligation long subsequent to the time of making the contract, and that said statute, if held to impose the duty either upon the contracting parties or their continuous suc-

cessors, forever imposed an unreasonable burden upon interstate commerce, contrary to the Constitution and laws of the United States. It was alleged that to compel the purchaser at the foreclosure sale herein to forever keep and maintain its general offices, shops and roundhouses (Tr. 1-30; Tr. 42-49), whereby the value of the property as a going concern was injured to the extent of many millions of dollars and the annual expense of operation needlessly increased many hundreds of thousands of dollars. It was further alleged that the defendants were threatening by suit in the State court to enforce the judgment of the District Court of Cherokee County, Texas, against the purchaser at such foreclosure sale, and to the end that such injury to the property then in the possession of the court should be obviated and the property passed to the purchaser under foreclosure sale free from the liens, charges and obligations laid upon it by the judgment of the District Court of Cherokee County, injunction was sought against the defendants restraining them from instituting any such suits or undertaking to assert rights under said judgment against the properties in the hands of the purchaser.

On July 28, 1922, the defendants herein filed plea to the jurisdiction, alleging that it appeared upon the face of the bill that the jurisdiction of the court as a Federal Court to hear and determine the suit is invoked only because the action is between citizens of different States; that plaintiff is an inhabitant and resident of the City of New York and State of New York, and the defendants were not inhabitants or residents of the Southern District of Texas, but were and are each and all inhabitants and residents of Anderson County, in

the Eastern District; and that it appeared upon the face of the bill that the general offices of the International & Great Northern Railway Company, the co-defendant of these defendants and the only other defendant in the suit, were at the commencement of the suit and are now located and established at the City of Palestine, in the Eastern District, and said city was at the time of the commencement of the suit and is now the domicile of said railway company; and that it appeared upon the face of the bill that by final judgment of the courts of the land, in full force at the time of the commencement of this suit, and now, and in all things operative and binding, then and now, upon said International & Great Northern Railway Company, said Palestine, Texas, had been established as the place of its domicile and is now the place of its domicile. Wherefore, as is disclosed on the face of the bill of complaint, this suit is not properly cognizable by this honorable court, and this court is without jurisdiction of it; and these defendants accordingly pray that it be dismissed." (Tr. 51.)

On August 29th, the trial court granted a motion to dismiss and entered decree accordingly. (Tr. 65-66.)

On the same day, the court made and filed its certificate upon the question of jurisdiction, wherein the court certifies:

> "On the pleadings of the plaintiff as well as the motion to dismiss, it appeared that the plaintiff was a citizen of and domiciled in New York State, and the defendants citizens of and domiciled in the Eastern District of Texas, except that the International and Great Northern Railway Company was alleged by the plaintiff to be domiciled by its charter in Houston, in Harris County, Texas, by the

other defendants to be domiciled in Palestine, Anderson County, Texas, in the Eastern District, but the court being of the opinion that said defendants have filed the motion to dismiss in proper form, and that no question of lien or servitude upon the property was presented, but rather a question of a liability on the part of a new concern to perform the public duties imposed by law upon the old corporation, and that this should be a controversy between the said defendants and the new company, buying the property at the sale, which cannot be heard in this court, except by the consent of said defendants, and that to hold otherwise would unduly extend the doctrine to ancillary jurisdiction, the court was of the opinion that there was no jurisdiction; and made the decree of dismissal.

"Now, therefore, it is certified that the question of jurisdiction of this court upon the grounds hereinbefore stated was properly presented by a motion to dismiss, namely, that there was no jurisdiction of this case.

"It is now certified that the only question upon the pleadings and process and record, for the decision of the Supreme Court of the United States, involved in the proceedings had, was a question of jurisdiction and that the International and Great Northern Railway Company filed its appearance, as a defendant, but did not further appear, but that the court held that there was no jurisdiction of it, or of any other of the defendants herein.

"The only question decided by the court was that it did not have jurisdiction.

"Now, therefore, it is certified that the question of jurisdiction of this court, upon the ground stated, was the only issue upon which this case decided, and on which the final decree was based.

"I found as stated above therefore that it was the duty of the court to dismiss the bill, which was accordingly done. I further certify that it is the only question, being one of law, upon the plead-

ings and process and record for the decision of the Supreme Court of the United States, as appears above, to wit, the jurisdictional question, and that this certificate is granted at the term and on the day on which the judgment in the cause was entered. In open court, Houston, August 29, A. D. 1923." (Tr. 71-72.)

Appeal was, therefore, prosecuted within the time allowed by law direct to this court.

The statute of 1889 as amended by the Act of 1899 will be found set out at length as Exhibit A to this brief.

Authorities.

Julian v. Central Trust Co., 193 U. S. 93.
Krippendorf v. Hyde, et al., 110 U. S. 276.
Dewey v. West Fairmont Gas Coal Company et al., 123 U. S. 329.
Compton v. Jesup et al., 68 Fed. 263.
St. L. S. F. R'y Co. v. McElvain, 253 Fed. 123.
Ferguson v. O. & S. W. R'y Co., 227 Fed. 513.
Hume v. City of New York, 255 Fed. 488.
Cushman et al. v. Warren-Schaff Asphalt Paving Co., 220 Fed. 857.
Gas & Electric Co. v. Manhattan Traction Corporation, 266 Fed. 634.
Mutual Reserve Fund Life Association v. Phelps, 190 U. S. 147.
Peck v. Elliott, 79 Fed. 10.
Brun et al. v. Mann, 151 Fed. 145.

Argument.

The properties of the International & Great Northern Railway Company which were being foreclosed in the original suit, No. 49 in Equity, were at the time of the filing of this ancillary bill in the possession of the court through its Receiver. The decree of foreclosure

had been rendered and entered, but the sale had not been made and the properties were in course of administration. The plaintiff in the original suit, the trustee of the mortgage of 1911, filed this suit as an ancillary bill in aid of the foreclosure, so that the properties might be sold free of the alleged claims of the defendants. These claims constitute under the decision of the Supreme Court in I. & G. N. R'y Co. v. Anderson County et al., 106 Texas, 60, a continuing charge upon the property. They affect the right of the purchaser to operate the road. They are, not only a limitation upon the continuance of corporate power, but a limitation pertaining to the use and enjoyment of the railroad property. They qualify the use and enjoyment of the property by an abridgement of the rights of the owner as to location of its roundhouses, machine shops and principal offices. The claims asserted involve an annual and useless expenditure and charge upon the revenue of the properties in excess of $500,00.00 and decreases the value of the property in the hands of the purchaser to the extent of $3,000,000.00. As stated by the Supreme Court of Texas, they constitute

> "a limitation that pertains to the use and enjoyment of essential parts of the railroad property,"

and, therefore directly interfere with possession, ownership and control of the property then being administered by the court under its decrees and which were about to be sold under plaintiff's mortgage of 1911. The bill alleges that the defendants are claiming that under a decree of the District Court of Cherokee County rendered in 1914, in their favor against the Inter-

national & Great Northern Railway Company, the mortgagor, the general offices, shops and roundhouses of said company were forever tied to and would be perpetually located at the town of Palestine, in Anderson County, and that they would seek to assert the obligation of this judgment against the properties in the hands of the purchaser at the foreclosure sale then pending. No more serious lien, charge and injury to these properties then being administered by the court and about to be sold under its decree can be imagined. The mortgagee, Central Union Trust Company of New York, whose mortgage of 1911 long antedates the filing of this suit and the date of this decree against the mortgagor, in order that the property might be sold free of this claim, invokes the ancillary jurisdiction of the court administering the properties and asks that the defendants be enjoined from seeking to enforce such claims, setting up that its mortgage antedated the suit; that it was not a party thereto; that as a matter of fact the alleged contracts of 1872 and 1875, which must exist to give incidence to the statute of 1889, never had any existence, and various other allegations going to the validity of defendants' claims not necessary for consideration here.

It must, of course, be admitted that the complainant, Central Union Trust Company of New York, is not bound by this judgment against its mortgagor, for while a judgment against a mortgagor rendered prior to the execution of the mortgage binds the mortgagee as a privy and is conclusive upon him, a mortgagee is not bound by any proceeding against his mortgagor which was not begun until after the execution of the mortgage, unless he was made a party thereto. If,

therefore, at the time this suit was filed, the court, through its receivers, had possession of the property, that court was the proper court through ancillary proceedings in which to litigate existing claims affecting the possession, operation and maintenance of the properties upon which decree of foreclosure had been entered and of which sale was about to be made. Questions of the binding force of this judgment of the State court, either as *res adjudicata* or as a question of former judgment, go to the merits of the case and not to the jurisdiction of the court.

The fallacy which pervades the argument of appellees in the lower court and which found lodgment in the decree of dismissal was that the holding of the State court in the suit against the mortgagor, railway company, establishing against it the terms of the General Office Statute of 1889, constituted merely the enforcement of a general police regulation of the State as established by its statutes, and that of such a suit the court had no jurisdiction; ignores the outstanding fact that complainant's mortgage lien was in process of foreclosure; that the properties were in the possession of the court; that complainant's mortgage long antedated the proceedings in the State court; that these proceedings, eventuating in a final judgment, constituted a direct interference with the possession, operation and value of the properties; that complainant had the right to test these questions and was not bound by the judgment, and that it had the right to prove that the contracts of 1872 and 1875, the existence of which alone gave incidence to the statute of 1889, never existed.

For the purposes of the argument, it might be admitted that all questions as to the validity of the stat-

ute of 1889 might be precluded under the doctrine of *res adjudicata,* but nevertheless, the court in which the ancillary bill was filed was, not only the proper court, but the only court which had jurisdiction to determine these questions which complainant, appellant here, had the right to raise.

Where jurisdiction has once been rightfully obtained by a Federal Court, it may be retained until complete relief is afforded within the general scope of the equities to be enforced. This jurisdiction having been obtained, the court also has jurisdiction of suits which are a continuation of, incidental or ancillary to the original suit. The usual nature of these ancillary bills are (1) proceedings looking to the enforcement, the setting aside, or the modification of the judgment or decree rendered, (2) restraining proceedings in other courts pending the original suit, and (3) receiverships and similar proceedings where the court, the ancillary jurisdiction of which is invoked, is administering a property or a fund.

Judge Sanborn in St. Louis, San Francisco Railway Company v. McElvain, 253 Fed., 123, in discussing the ancillary jurisdiction, says:

> "A suit in equity dependent upon an original suit or action of which the Federal Court had jurisdiction, may be maintained in that court (1) to aid, enjoin or regulate the original suit, (2) to restrain, avoid, explain or enforce the judgment or decree therein, (3) to enforce or adjudicate liens or claims to property in the custody of the court in the original suit, and (4) to enforce its decree or judgment in the original suit to prevent the relitigation in other courts of the issues it has heard and adjudicated in the original suit, and *to protect*

the titles and rights acquired by purchasers under its decree or judgment from attacks by suit or otherwise, based on the theory that its adjudications in the original suit were illegal and ineffectual, and to accomplish these ends the court has the jurisdiction and authority to use its writs of injunction and its writs of assistance."

In that case the railway company had been sold under foreclosure and was in the possession of the purchaser, the decree reserving jurisdiction being not as explicit as those of the decrees in this cause. McElvain brought suit in State Courts upon claims against the foreclosure company which had answered in suit, and the purchaser by ancillary bill sought to enjoin the prosecution of these suits. It was argued that the suit could not be maintained because a dependent suit may be maintained only between those who are parties to the original suit, and the court answered this contention by saying that:

> "A dependent suit may be maintained by the parties to the original suit, or by one who claims under the adjudication and decrees therein against one who assails that adjudication or decree in a subsequent suit in a court without appellate jurisdiction on the ground that it is illegal and ineffectual although the latter was not a party to the original suit, the adjudication or the decree."

After discussing the case of Julian v. Central Trust Co., 193 U. S., 93, and other authorities, the opinion proceeds:

> "But in a case in which a Federal Court first obtains jurisdiction of the subject-matter in controversy, as this court did, by the commencement and prosecution to decree and sale of the original suit, and where it acts in aid of its own jurisdiction, to enforce or protect its orders or decrees, or the title

> or disposition under them of the property within that jurisdiction, it may, notwithstanding the section cited (Section 720, U. S. Revised Statutes) enjoin or restrain all proceedings in the State Court commenced after it obtained jurisdiction which would have the effect of defeating or impairing its jurisdiction or the lawful effect of its orders, decrees, adjudications or title which it has made or is making in the exercise of that jurisdiction."

Julian v. Central Trust Company, 193 U. S. 93, is a leading case upon the ancillary jurisdiction, and without further citation of authority, is sufficient to maintain this bill. In this case the Central Trust Company of New York foreclosed a second mortgage on the property of the Western North Carolina Railroad. The sale was had under decree and property purchased by the Southern Railway Company which went into possession. About three years after the purchaser took possession, suit was brought against the Western North Carolina Railroad Company for damages for the death of an employe in the State Courts, which held that, notwithstanding the foreclosure and sale under the statutes of North Carolina, the company and its corporate property was liable. Execution was issued on the judgment and the Trustee and purchaser filed an ancillary bill in the original foreclosure proceedings to enjoin the sale. The reservations in the decree were not so specific as those here involved, but the court held that the proceedings were ancillary and sustained the jurisdiction. It says, page 111, etc.:

> "It is obvious that by this decree of sale and confirmation it was the intention and purpose of the Federal Court to retain jurisdiction over the cause so far as was necessary to determine all liens and

demands to be paid by the purchaser. It accepted the purchaser, and thereby made it a party to the suit. The court reserved the right to retake the property if necessary to enforce any lien that might be adjudged against the same. On the other hand, the purchaser agreed to pay only such demands as the Circuit Court might declare and adjudge to be legally due, with the right of appeal from such judgment. These provisions make apparent the purpose of the court to retain jurisdiction for the purpose of itself settling and determining all liens and demands which the purchaser should pay as a condition of security in the title which the court had decreed to be conveyed. If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because in the view of the State Court it was ineffectual to pass title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view of protecting the prior jurisdiction of the Federal Court and to render effectual its decree.

* * *

"Nor is it an answer to say that these judgments were for causes of action arising subsequent to the confirmation of sale. The Federal Court by its decree reserved the right to determine what liens or claims should be charged upon the title conveyed by the court, and by the levy and sale to pay these judgments the title is charged with other liens established in another court in a proceeding to which the purchaser was not a party. The Federal Court in protecting the purchaser under such circumstances was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.

In Farmers' Loan & Trust Company, 129 U. S. 206, Mr. Justice Miller said: 'But the doctrine that after a decree which disposes of a principal subject of litigation and settles the right of the parties in regard to that matter, there may subsequently

arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights may be appealed from, is well established by the decisions of this court.'

"We think this case belongs to the class instanced by the learned justice, and that the Circuit Court by the order made retained jurisdiction of the case to settle all claims against the property and to determine what burdens should be borne by the purchaser as a condition of holding the title conveyed. In such cases the jurisdiction of the court may be invoked by supplemental bill or bill in the nature of a supplemental bill irrespective of the citizenship of the parties. Freeman v. Howe et al., 27 How. 450. The authorities are collected in a note to Sec. 97, Vol. 1, of Bates on Federal Equity Procedure, and the doctrine thus summarized: 'It would seem that the prevention of the conflict of authority between the State and Federal Courts, and the protection and preservation of the jurisdiction of each, free from encroachments by the other, are considerations which lie at the very foundation of ancillary jurisdiction. A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional partiese, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes, or to restrain a party from using a judg-

ment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit.'

"While recognizing the weight which should be given to decisions of the Supreme Court of a State in construing its own laws, and being disposed to follow them and accept the conclusions reached in construing local statutes in every case of doubt, we are here dealing with a right and title conferred by authority of the decree of a Federal Court, which may be virtually set aside and held for naught if the property awarded can be taken upon execution in suits to which the purchaser is not a party. It is conceded that the Federal right could be set up in the State Court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court. In the view we have taken of this case the Federal Court had not lost its jurisdiction to protect the purchaser at its sale upon direct proceedings such as are now before us."

It is clear that the rights asserted by the defendants in this case, as construed by the Supreme Court of the State, directly interfere with the operation and control, and impose a lien, charge and burden upon the foreclosed property. Suppose that the law relied upon gave these defendants the right of judgment for damages and execution for breach of contract, and it was sought to levy upon the foreclosed property under execution: then the analogy would be complete between such a case

and that here presented. However, the burden sought to be relieved against is far more serious in its nature in that it is a continuous and perpetual wrong.

As a test of the proposition: Suppose these defendants at the very time that complainant filed the bill now before the court had filed an ancillary bill seeking to subject the properties in the hands of the purchaser to the burdens and charges which they set up. Could the purchaser or the Trustee have been heard to say that this court had no jurisdiction by reason of citizenship or residence? It must be conceded, of course, that they had such a right. The right then is correlative.

Ferguson v. O. & S. W. Railway Company, 227 Fed. 513, is very much in point. In this case Childs conveyed land as a right-of-way to a railroad, reserving certain rights as to crossings and imposing upon the railway company the obligation to maintain a road. Thereafter, Childs mortgaged the land to Ferguson, who went into possession. Suit to foreclose this mortgage was brought by successors to Ferguson's title. Pending this suit, Childs made a quit-claim deed to the railway, relieving it from the obligation of the original deed. The mortgage was foreclosed, the property sold and the sale confirmed. The purchaser under the foreclosure sale brought suit against the railway company by way of ancillary bill in the foreclosure suit to compel compliance with the reservations in the original deed to the railway company. The bill was dismissed for lack of jurisdiction, but this action was reversed, the court holding that while the plaintiff in the foreclosure suit could have brought in the railway at the inception

of the proceedings, the purchaser had the right to bring it in by ancillary bill and compel performance with the covenants of the original conveyance.

Krippendorf v. Hyde et al., 110 U. S. 276. This is a leading case upon the subject of ancillary bills. Suit was filed at law in the Federal Court and attachment was levied on the property of Krippendorf, who tendered replevy or delivery bond and obtained relief. He undertook to intervene in the case, but intervention was not allowed in accordance with some State rule of practice at law. Various creditors with debts under jurisdictional amounts made themselves parties to the proceedings to obtain benefits of the attachment. Judgment was rendered for the debts and for foreclosure of attachment. Thereupon Krippendorf deposited in court the value of the property and filed a bill in the same court making all the creditors in the original suit and the marshal parties, asking that the marshal be restrained from paying the fund to the creditors and that the same be adjudicated to belong to him. No allegations as to citizenship, either of defendants or plaintiffs, were made, and the bill was dismissed for lack of jurisdiction. On appeal, it was held that the bill was not original, but merely ancillary or dependent and the order of dismissal was reversed. The court, in holding that the bill was ancillary or dependent, says that in such a proceeding the question is not whether the bill is independent and original or supplemental and ancillary in the sense of the rules of equity pleading, but whether it is original and independent or supplemental and ancillary with reference to the line which divides the jurisdiction of the Federal from the State Courts. Thus, under the chancery practice, a bill to

enjoin a judgment at law is certainly an original bill, yet the Supreme Court has many times decided that when such a bill is filed in the same court as that rendering the original judgment, it is not to be considered as an original bill, but a mere continuance of the original proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpoena on the defendant, though he be a citizen of another State, if he were a party to the original judgment.

Dewey v. West Fairmont Gas Coal Company et al., 123 U. S. 329. West Fairmont Gas Company, a New York corporation, sued Dewey et al., partners, in a State Court in West Virginia for breach of contract to receive coal. The defendants removed to the Federal Court and there filed a bill against the plaintiff, a New York corporation, and its vendee, a West Virginia corporation, alleging that the coal, a part of which had been delivered, was not according to sample; that they had been damaged in a large sum; that the conveyance of property to the West Virginia corporation was in fraud of their rights as creditors, asking cancellation of the conveyance and the subjection of the properties to whatever judgment they might obtain. It was objected to this bill that the court had no jurisdiction of the West Virginia corporation, it being a citizen of the same State with plaintiffs. It was held that the bill was ancillary to the original suit at law, and was maintainable without reference to citizenship or residence of the parties.

Hume v. City of New York, 255 Fed. 488. Property administered under a receivership had been sold under

foreclosure and was in hands of the purchaser. The Receiver brought suit in the original cause against the City of New York for damage to the property sold. The court said:

> "If the present bill can be said to restrain, avoid, explain or enforce the judgment or decree in the original suit, or to enforce or obtain judgment upon claims of injury to the property in the custody of the court in the original suit, such a dependent suit is but a continuation in the court of equity of the original suit, to the end that complete justice may be done, and, notwithstanding lack of diversity of citizenship, the bill was maintained as an ancillary bill.'"

Cushman et al. v. Warren-Schaff Asphalt Paving Company, 220 Fed. 857. In this case judgment was had against a city under a paving contract directing levy of tax to pay. Plaintiff filed bill against several abutting owners against whose property the amount would be a lien for their pro rata part of the contract price. No one of these debts was sufficient in amount to confer jurisdiction, but the bill was held to be purely ancillary, and, therefore, maintainable as dependent upon the original suit.

Gas & Electric Co. v. Manhattan Traction Corporation, 266 Fed. 634. A Receiver of a street railway in foreclosure proceedings pending in the Federal Court brought suit for injunction against a municipality to enjoin passing of a resolution forfeiting its franchise. Here was certainly a proceeding directly involving the highest police powers. It was held, nevertheless, that the suit was purely ancillary to the original cause, and properly brought.

Mutual Reserve Fund Life Association v. Phelps, 190 U. S. 147. Judgment was had in a Kentucky State Court against a life insurance society, and upon execution and return of *nulla bona*, it being shown that the company had withdrawn all its agents from the State, the Kentucky Court, without notice, appointed a Receiver to collect premiums due the company for the purpose of applying them in payment of the judgments. Suit was brought in the Federal Court to enjoin the activities of this Receiver on the theory that the appointment was void as being without notice. It was held that the proceeding was purely ancillary and within the power of the court.

Compton v. Jesup et al., 68 Fed. 263. A suit was brought in a Federal Court to foreclose one of several mortgages to which the Wabash & Pacific Railway Company and its component parts were subject. The road was sold under decree of foreclosure, but had not been turned over to the purchasers by the Receivers who had been in possession. While the road was still in possession of the Receivers, the mortgagees under a prior mortgage commenced a suit in the same Federal Court to foreclose their mortgage, to which suit numerous persons having interest in or claims upon the road were made parties and filed answers and cross-bills, citizens of the same States appearing upon both sides of the controversy. It was held that the Federal Court which had possession of the property had inherent ancillary jurisdiction to entertain the suit, because of such possession, without regard to the citizenship of the parties, and that in such dependent or ancillary suit the court had power to bring in by compul-

sory process any person claiming an interest in the property whose presence was necessary to the relief sought by complainant, although such person did not himself seek the establishment of his interest in the suit and his citizenship was such that it would defeat the jurisdiction if it depended upon diverse citizenship. The decision is by the Circuit Court of Appeals for the Sixth Circuit, and is rendered by Judge Taft, the present Chief Justice. It contains a comprehensive discussion of the theo[illegible] of ancillary bills, and, among other things, says:

"Now, it frequently happens that under the process of the Federal Courts, exercising the original and lawful jurisdiction conferred expressly by the Federal Constitution and statutes, possession is taken and control exercised over property in which persons not indispensable parties to the suit have an interest, by lien, mortgage, and in other ways. In such cases there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the Federal court in hearing an independent suit between them. But it may be essential, to preserve intact their rights in the property, that such third persons sould be permitted, at once, to have specific relief, which can only be granted by a court having possession and control of the property. And yet, in accordance with the principles already stated, no court but the Federal Court can exercise possession and control over the property in its custody. Of necessity, therefore, the Federal courts exercise an ancillary jurisdiction in such cases; and third persons are permitted to come into the Federal Court, an[illegible] set up their interest in the property, and secure the same full and adequate protection and relief to which they would be entitled in any court of

competent jurisdiction, were the property not impounded in the Federal Court."

The court further says:

"It must be conceded that the Circuit Court had no jurisdiction to hear and determine the controversies presented by the Knox and Jesup bill, on the ground of diverse citizenship of the parties, for it did not exist. The jurisdiction was assumed on a very different ground. When the bill was filed in the court below, the property which it was thereby sought to sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox and Jesup mortgage, and to sell the road to pay all junior liens and floating indebtedness. It is true, the litigation had proceeded to foreclosure sale and final decree; but for some reason, not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jesup wished to foreclose their mortgage, to marshall all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been appointed could grant such relief. Whether other courts could decree foreclosure and marshall liens, or not, certainly no other court could take possession of and sell the road, and deliver an unclouded title to a purchaser. If Knox and Jesup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction, pending its possession of the rail-

road, to hear and determine all petitions for relief presented to it in respect of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox and Jesup. Their mortgage was then due. They were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They therefore properly appealed to the court below, as the only tribunal which could do so, to give them adequate relief at once; and this was properly accorded to them, without regard to the citizenship of the parties to their bill. The foregoing reasoning is fully supported by many decisions of the Supreme Court. Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked."

The further objection was made in this case that, although the court had jurisdiction to maintain the ancillary bill of these mortgagees, it had no power to bring the defendant Compton before it, but the court held that, inasmuch as Compton was asserting a claim and a lien upon the property, it was proper to make him a party defendant and dispose of the claim.

Peck v. Elliott, 79 Fed. 10, decided by Circuit Court of Appeals, Sixth Circuit. An insolvent corporation had been placed in the hands of receivers and its as-

sets administered by the Federal court, and the receivers filed petition, alleging the inadequacy of assets to pay debts, and setting out that Elliott, a director and president of the corporation, was indebted to the corporation in a large sum for unpaid stock subscription, and asking that this stock liability be enforced. The usual objection of lack of jurisdiction was made and the bill dismissed. The case was heard on appeal by Judges Taft and Lurton, both subsequently members of the Supreme Court, and by Judge Sage, District Judge. Judge Lurton, rendering the opinion of the court, said:

> "The jurisdiction of the court to entertain this petition of the receivers against the appellee depends upon its jurisdiction in the original case, to which this proceeding was wholly ancillary. This petition is auxiliary to the original suit. It is a petition by the receivers asking the aid of the court to enable them to collect in an asset of the corporation. It was filed by direction of the court under an order made in the principal cause. The jurisdiction of the court in the principal cause is not questioned, and cannot be in this collateral suit. * * * Such a proceeding would not involve any question of citizenship, or amount in controversy, or mode of trial. The complete jurisdiction of the court over the *res*, the property and assets of this corporation, involved its right to bring before it persons having possession of any of those assets, or having claim thereon, or who were indebted to it, and either itself hear and determine all controversies, or refer them to a master or to a jury, as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved."

Brun, et al., v. Mann, 151 Fed. 145. This case would

seem to involve rather an extended application of the doctrine of ancillary suits. A judgment had been obtained in a Federal court for damages. The defendant had died and the estate was administered in the probate court of Colorado. The judgment was proved up in the probate court as a claim against the estate. The widow and administratrix would make no application to sell the property to pay the claim. The widow filed a bill in the Federal court to procure a decree of discharge and satisfaction of the original judgment, and on cross-bill the judgment was revived to be paid in due course of administration with order that copy of the decree should be certified to the probate court for allowance, classification and payment. It was allowed as a claim against the estate, but the administratrix would take no action to apply the lands of the estate to the payment of the claim. She having refused to do so, the plaintiff filed a bill in the court of the original judgment to subject the land to the payment thereof, the widow having in the meantime resigned as administratrix. While objecting to the jurisdiction of the court, she made application to file cross-bill which set forth her claim for a widow's allowance and claim for allowance for expenses and services as administratrix. This was denied. Decree was rendered subjecting the land to the payment of the debt, and appeal was taken. The court of appeals, Judges Sanborn, Van Devanter and Phillips, held that the court below had jurisdiction, the proceedings being ancillary. It said:

> "Diversity of citizenship and the amount in controversy conferred jurisdiction upon the United States Circuit Court to render the original judg-

ment against Tillett for his wrongful seizure and conversion of the cattle. Plenary power to enforce this judgment and to determine every controversy between the parties thereto and their successors in interest which conditioned that enforcement inhered in, and was a necessary part of, this jurisdiction. No State legislation may take away from the national courts the power to enforce their adjudications, because that power is derived from the supreme law of the land, from the Constitution and the statutes of the United States. 'The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. * * * * The only limit upon this power of the national courts to execute their judgments and decrees is that they may not seize or take from another court property in its exclusive legal custody.

"Nor was the right of the complainant to invoke this jurisdiction conditioned by the existence of a Federal question or of diversity of citizenship or of the amount in controversy. A bill in equity dependent upon a former action of which the Federal court had jurisdiction may be maintained in the absence of either of these attributes to aid, enjoin, or regulate the original suit; to restrain, avoid, explain, or enforce the judgment or decree therein; or to enforce or obtain an adjudication of liens upon, or claims to property in the custody of the court in the original suit. Such a dependent suit is but a continuation in a court of equity of the original suit, to the end that more complete justice may be done. * * * This is a suit to enforce the execution of the judgment of revivor rendered in the Federal court. It is not, as counsel claim, a proceeding to enforce the allowance or the judgment of allowance of the complainant's claim in the county court. That allowance was complete in itself and *functus officio* when made. It adjudged

no recovery by the complainant, no sale for his benefit, no further relief. The judgment of revivor in the Federal court granted to the complainant the right to recover $19,718.56 of the estate of Tillett, and this suit was instituted to enforce that right and to determine the controversy over the exemption of the lands which conditions it. It has every element of a dependent suit in equity in the Federal courts."

It will be observed that the contention was made that this assumption of jurisdiction by ancillary bill was in effect an invasion of the jurisdiction of the State probate court, but the court held otherwse.

It is submitted that had there been no reservations of control in the decrees and orders of the court, that the properties of the railway, being in its possession and under its administration, the bill was purely ancillary to the main purposes of the original suit, and that, therefore, the court had jurisdiction to maintain it, regardless of other jurisdictional requisites.

SECOND POINT.

The court erred in sustaining the motion to dismiss, and in dismissing this cause; because this court, in the suit of the Central Union Trust Company of New York v. International & Great Northern Railway Company, et al., No. 49 in Equity, in this court, to which this suit was ancillary, had the power to reserve, as it did, in the decree of foreclosure of the properties of the International & Great Northern Railway Company entered May 17, 1915, and in the decree of confirmation of sale entered August 10th, 1922, after the institution of this suit, as it did, the exclusive jurisdiction of this suit; and because, by amendment to the pleading here-

in, after the confirmation of sale, such reservations in the decree of confirmation were set out and plead and drawn to the attention of this court, wherein jurisdiction of this suit was directly reserved, and because this suit was brought before the court had sold the property or released it.

Statement.

That portion of the decree of foreclosure in the original cause, No. 49, of May 17, 1915, applicable, is set out on pages 51-55, and among other pertinent provisions contains the following:

> "All questions not hereby disposed of are reserved for future adjudication. * * * The court reserves the right to resell the mortgaged property upon such notice as it may direct, at the risk and cost of the purchaser in case the purchaser thereof shall fail or omit to make any payments on account of the purchase price within twenty days after the entry of the order requiring such payment."

After this suit was filed and during its pendency, the properties were sold and the order confirming the sale of date August 10, 1922 (Tr. 55-60) was entered. Among other pertinent reservations of jurisdiction and control over the properties found in this decree are the following:

> "Eighth. The court reserves jurisdiction over the property sold with reference to all claims against the sold-out International & Great Northern Railway Company, which have been litigated or may hereafter be litigated in this or any court, so far as to enforce the payment of any judgments therefor out of the property sold, if the same be

not paid within ninety days after the delivery of the deed (herein provided for), to the purchasers or their assignee, if such judgments are within the protection of the Revised Statutes of Texas, Articles 6624 and 6625, or either of such articles, and the payment thereof is hereby made a charge upon the property.

"Ninth. All questions relating to amounts of compensation, charges, allowances, costs, disbursements and expenses, referred to in said final decree, and *to suits now pending in this court in this cause, or affecting the property above dealt with,* are hereby respectively reserved by this court for further hearing and determination, and all adjustments and payments to be made, unless agreed upon by the parties in interest, shall hereafter be determined, fixed, allowed and settled by this court. And *all questions not hereby disposed of are reserved for future adjudication, including all claims pending or hereafter made against the property sold originating under the Receiver, the defendant or its predecessors in title.* Any party to this cause and any party who has intervened in this cause, may at any time apply to this court for further relief at the foot of this order." (Tr. 59-60.)

At the time the order of confirmation was entered, this ancillary bill, appeal from the dismissal of which is prosecuted in this cause, was pending in the original foreclosure suit.

Authorities.

In re Farmers Loan & Trust Co., 129 U. S. 206.
Wabash R. R. Co. v. Adelbert College, 208 U. S. 38.
Central Trust Co. v. Railway Co., 59 Fed. 385.
Smith v. Missouri Pac. R'y Co., 266 Fed. 653.
Gunter v. Atl. Coast Line, 200 U. S. 273.

Argument.

These authorities, as well as the authorities cited under the preceding proposition, it is thought, amply sustain the contention of appellant that even had there been no special reserevation of control in the decrees of the court administering the properties, the mere possession of the *res* made it necessary and proper to go into that court to relieve the property of asserted charges upon and against it which directly affected its value in the most substantial way, directly interfered with its control and operation and imposed upon it a needless and absolutely unnecessary annual charge in expense of operation amounting to many hundreds of thousands of dollars. If by reason of a judgment against a mortgagor obtained in a suit filed long subsequent to the date of the mortgage and which it cannot be seriously contended is binding upon such prior mortgagee the operation of the property is so far controlled as to render it less valuable, the mortgagee's security is impaired, and as a consequence the purchaser at the sale does not succeed to the rights which the mortgagee acquired at the date of the mortgage. The court being in possession of the property had the inherent right upon ancillary application to determine these questions, but the reservations of the two decrees should relieve the matter of all possible doubt. The mortgagor and the purchaser had the right under these decrees to assume that such adverse claims should be determined by the court administering the properties. This suit was pending and the court reserved jurisdiction of "all questions relating to suits now pending in this court or affecting the properties dealt with." It is difficult to conceive a more specific res-

ervation of jurisdiction, and the point here made comes accurately within the statement of the principle by Mr. Justice Holmes in I. & G. N. v. Anderson County, 246 U. S. 431. In the case then before this court, the jurisdiction of the State court was challenged upon the ground that the court of the last foreclosure on the properties (Federal Circuit Court) was the only proper forum, and it was said:

> "But a decree of foreclosure does not render the purchaser and property foreclosed sacrosanct. The Circuit Court *had finished the case and had given up possession and control before this suit was brought.* Shields v. Coleman, 157 U. S. 168; Wabash R'y Co. v. Adelbert College, 208 U. S. 38. Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railroad company was entitled to set up, *in the absence of action on the part of the court of the United States,* it would not take away the power of the State court to decide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat."

The difference between that case and the pending case is, first, the court had not given up possession of the property, but the property was in its possession and being actively administered at the time this proceeding was filed; and second, specific and accurate reservations to determine questions such as those here involved were made in the decree. Attention is again directed to the proposition that the force and effect of the judgment of the District Court of Cherokee County against the mortgagor company, whether as considered from the standpoint of *res adjudicata* or of

former judgment, goes to the merits of the case and not to the jurisdiction of the court. The learned trial judge recognizes this and does not dismiss upon the merits, but, as clearly shown by his opinion, holds that the court as a Federal Court had no jurisdiction to determine whether or not the supposed contracts of 1872 and 1875 ever existed and had no jurisdiction as a Federal Court to determine whether the Act of 1889, described as a general police regulation of the State, was applicable to the properties being foreclosed. Even though the principle asserted were sound, as it is not, it would have no application here for the reason that the Act of 1889 does not come into operation unless the existence of the contracts of 1872 and 1875 is presupposed. This is a question of fact. The mortgage was executed in 1911 before the suit relied upon by defendants was filed, and it is too elementary to require citation of authority that a mortgagee who was not a party to the suit is in nowise affected or bound thereby. The principle asserted, however, is unsound as shown by a long line of cases involving public and private right, and holding that the establishment of a fact or facts necessary to give incidence to a statute is not binding on such mortgagee or a purchaser under the mortgage.

Keokuk R. R. Co. v. Scotland County, 152 U. S. 318.
Secor v. Singleton, 41 Fed. 725.
Wycomo County v. Bancroft, 135 Fed. 977.
Trust Co. v. Des Moines, 224 Fed. 620.
Farmers' Loan & Trust Co. v. Meridian Water Works, 139 Fed. 661.
Columbia Ave. Savings Fund v. City of Watson, 130 Fed. 152.
Keokuk & W. R. R. Co. v. Mo., 152 U. S. 301.

Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296.

Old Colony Trust Co. v. City of Omaha, 230 U. S. 100.

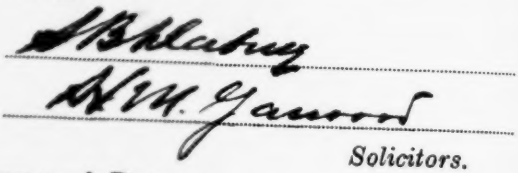
It has been uniformly held that, although State, city or citizens had made claims affirmed by the highest court, declaring public duties, or burdening franchises, or physical properties under the statute, or ascertaining and adjudging facts on which the statutes would have incidence, yet nothing so decreed was *res adjudicata* against an admitted mortgagee, or purchaser under him.

It is believed that the two propositions submitted present substantially the errors complained of in the several assignments made.

It is submitted, therefore, that the decree of the court below dismissing this cause for lack of jurisdiction is erroneous and should be reversed; first, because that court in Cause No. 49 in Equity, Central Trust Company of New York v. International & Great Northern Railway Company, was foreclosing under receivership proceedings complainant's mortgage upon said properties and had actual possession at the time this suit was filed of the *res;* second, because that court had accurately and specifically reserved jurisdiction to determine all adverse claims to and upon the property affecting its ownership, operation, control and value, and had specifically reserved jurisdiction of this suit which was pending at the time the order was made; third, the bill dismissed is purely an ancillary or dependent bill and jurisdiction is not dependent upon citizenship, amount, residence or subject-matter, except that the

complaint must be germane to the purposes and objects of the original foreclosure suit.

It is, therefore, prayed that the decree appealed from be reversed.



Solicitors.

LARKIN, RATHBONE & PERRY,
BAKER, BOTTS, PARKER & GARWOOD,
Of Counsel.

EXHIBIT A.

Act of the Legislature of the State of Texas of 1889, and amended by Act of 1899, being present Articles 6423, 6424, and 6425, Revised Statutes of Texas.

"Article 6423. Every railroad company chartered by this State, or owning or operating any line of railway within this State, shall keep and maintain permanently its general offices within the State of Texas at the place named in its charter for the locating of its general offices; and, if no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this State where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general offices for a valuable consideration; and, if said railroad company has not contracted or agreed for a valuable consideration to maintain its general office at any certain place within this State, then such general offices shall be located and maintained at such place on its line in this State as said railroad companies may designate to be on its line of railway. And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and, if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.

"Article 6424. It shall be the duty of said railroad company to keep and maintain at the place

within this State where its said general offices are located the office of its president, or vice-president, also the office of its secretary, treasurer, local treasurer, auditor, general freight agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, fuel agent, general claim agent; and each and every one of its general offices shall be so kept and maintained, by whatsoever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where the said general offices of said railroad are required by law to be kept and maintained; and the persons holding said general offices of a railroad shall reside at the place and keep and maintain their offices of said railroad are required by law to be kept and maintained; and, if the duties of any of the above named officers are performed by any person, but his position is called by a different name, it is hereby made the duty of the said railroad company to have and maintain said offices at the place where its general Texas offices are kept and maintained, as required by this chapter; provided that if the judgment of the court shall be to forfeit the charter, then it shall allow the railroad company six months from the date of the judgment within which to comply with the requirements of this chapter, and if said railroad company shall comply with the said time no forfeiture shall occur; but if the railroad company shall not comply then the judgment shall be final; the object and meaning of this statute being to require every railroad company owning or operating a line of railway within this State to keep and maintain its general offices within this State at such place as required herein; and the name of the general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place than

the one it is required to keep its general offices at; and each and every railroad is hereby required to have and maintain its general offices at a place named herein; provided, further, that where the principal shops of any company are situated on its line in the State, at a place other than the place where its general offices are located, the superintendent of motive power and machinery, master mechanic, either or both, may have his office and residence at such place where such principal shops are located; and provided, further, that the railroad commission of Texas, where it is made to appear that any officer, other than the general officers of any company, can more conveniently perform his duties by residing at some place on the line in Texas other than the place where the general offices are situated, may, by an order entered on its record, authorize any such officer to so reside and keep his office at such place.

"Article 6425. Each and every railroad company chartered by this State, or owning, operating or controlling any line of railroad within this State, which shall violate any of the provisions of this chapter, shall forfeit the charter by which it operates its railroad in this State to the State of Texas; and it is hereby made the duty of the attorney general of this State, upon the application of any interested party, or on his own motion, to proceed at once against every railroad company owning, operating or controlling any line of railway within this State by quo warranto to forfeit the charter of the railroad company so offending, or violating any of the provisions of this law (and every such railroad company) shall in addition to forfeiting the charter to that part of the railroad situated within this State be subject to a penalty of five thousand dollars for each and every day it violates any of the provisions of this chapter; said penalty to be recovered in the name of the State of Texas by a suit which shall be filed by the attor-

ney general in any court in this State having jurisdiction; and on the trial the court shall, if it finds that the railroad company has violated any of the provisions of this chapter, render judgment in the name of the State of Texas at the rate of the sum of five thousand dollars for each and every day said court shall find that said railroad company violated any of the provisions of this chapter. And any money recovered from any railroad company under the provisions of this law shall be paid over into the State treasury and become a part of the available public free school fund."

No. [redacted] 178

IN THE

Supreme Court of the United States

October Term [illegible]

CENTRAL UNION TRUST COMPANY
OF NEW YORK,

Appellant,

vs.

ANDERSON COUNTY, TEXAS, THE CITY OF
PALESTINE, GEO. A. WRIGHT, et al.,

Appellees.

Appealed from the District Court of the United States
for the Southern District of Texas.

BRIEF FOR APPELLEES

Anderson County, Texas, City of Palestine, [illegible]
Geo. A. W[illegible] [illegible] [illegible]
[illegible] [illegible]
[illegible]

INDEX

Authorities Cited

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Appellees.

Appealed from the District Court of the United States for the Southern District of Texas.

BRIEF FOR APPELLEES,

Anderson County, Texas; City of Palestine, Texas; Geo. A. Wright; A. L. Bowers; John R. Hearne; Z. L. Robinson; E. W. Link; R. C. Sewell; John M. Colley and P. H. Hughes.

This suit, while called by the appellant an ancillary suit to a certain foreclosure proceeding against the

International & Great Northern Railway Company pending in the District Court of the United States for the Southern District of Texas, is in reality, as plainly shown by the bill of complaint, an attack upon and an effort to annul judgments of the courts of Texas wherein it was decreed that the general offices, shops and round houses of the railroad, by whomever owned or operated, should, in virtue of and as required by the statute law of Texas, be permanently maintained in the City of Palestine, in Anderson County, Texas.

Those judgments were affirmed, and the rulings of the Texas courts as to the effect and operation of the Texas statutes upheld by this Honorable Court in International & Great Northern Railway Company vs. Anderson County, et al., 246 U. S. 424.

The bill of complaint was dismissed on the motion of these appellees, because, as held by the trial court, the suit was not in any proper sense an ancillary action to the foreclosure proceeding and hence the court was without jurisdiction, since, otherwise, the venue of the suit, as shown by the bill, was in the Eastern, and not the Southern District of Texas where brought.

The bill alleged that all of the defendants other than the International & Great Northern Railway Company, these appellees, were citizens and residents of Palestine, Anderson County, Texas, which was alleged to be in the Eastern District of Texas. It showed that under the judgments of the Texas courts, affirmed by this Court, in International & Great Northern Railway Company vs. Anderson County, et al., 246 U. S. 424, and thereby made final, and which it was the purpose of the suit to destroy, the City of Palestine, in Anderson County and the Eastern District of Texas, was lawfully the place of the location of the general offices of the International & Great Northern Railway Company, a Texas corporation, the sole other defendant. Hence the bill showed that as established by final judgment, where that question was in issue, the International & Great Northern Railway Company was also a resident of the Eastern District of Texas. G. H. & S. A. Ry. Co. vs. Gonzales, 151 U. S. 497.

By Article 6437 of the Revised Civil Statutes of Texas it is provided that "the public office of a railroad corporation shall be considered the domicile of the corporation."

Since the judgment in the suit of Anderson County,

et al, established that, lawfully, the domicile of the defendant Railway Company is at Palestine, in the Eastern District of Texas, that judgment, pleaded as it is in the bill, in its establishment of the lawful domicile of the Railway Company governs so long as the judgment stands. The bill shows that it still stands.

As shown by the bill, therefore, all of the defendants are residents of the Eastern District of Texas.

The opinion of the District Judge sustaining the motion to dismiss the bill is given in the Transcript, pages 61-5. The first part of it deals with a contention not urged here by the appellant.

For an understanding of this suit, its nature and its purpose, a brief reference to the history of the prior litigation out of which it grows, and which culminated in the decision of this Court in International & Great Northern Railway Company vs. Anderson County, et al., 246 U. S. 424, as found in Mr. Justice Holmes' opinion and the opinions of the Supreme Court of Texas, and the Court of Civil Appeals there referred to, and dealt with in the bill of complaint, is necessary.

In 1889 the Legislature of Texas enacted what has

been commonly known as "The Railroad General Offices Act." The Act was founded in public experience and grew out of public necessity. It is now expressed in Articles 6423, 6424, and 6425 of the Revised Civil Statutes of Texas, copied as an exhibit in appellant's brief.

Article 6423 provides that every railroad chartered by this State shall keep its general offices, machine shops and round houses at such places as it may have contracted to keep them for a valuable consideration received; **"and if said general offices and shops and round houses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization."**

Article 6425, Section 3 of the original Act, denounces penalties for the violation of Article 6423, those penalties being the forfeiture of the charter of the railroad company, and in addition a fine of $5,000.00 for every day of the violation.

In furtherance of the public policy expressed in

the Act of 1889, in 1915 the Legislature amended former Article 6435 so as to prohibit any railroad corporation, **after the taking effect of the amendment —which was ninety days after March 20th, 1915— from changing, thereafter, the location of its general offices, machine shops and round houses, save with the consent and approval of the Railroad Commission of Texas**; the amendment applying, as well, to **receivers** and to **purchasers** of the franchises of properties of railroad companies and to **new corporations** formed by such purchasers or their assigns. By the amendment the Railroad Commission was forbidden to consent to or approve any removal or change in location in conflict with the restrictions of Article 6423.

This amendment of Article 6435 may be found in Volume 2 of the 1918 Supplement of Vernon's Texas Civil and Criminal Statutes, at page 1438. It is set out in the Appendix, page 46.

The original International and Great Northern Railroad Company was formed by the consolidation under the Act of the Legislature of Texas of April 24th, 1874, of two then existing railroad companies, each of which had been previously chartered by the Legislature, namely, the Houston and Great Northern Rail-

road Company and the International Railroad Company.

In 1872 the line of the Houston and Great Northern Railroad Company extended from Houston to the north boundary line of Houston County. The line of the International Railroad Company extended from Palestine to Hearne.

In the year 1872, Galusha A. Grow was the President of the Houston and Great Northern Railroad Company, and in that year he sought out the Honorable John H. Reagan, at Palestine, and through him proposed to the citizens of Palestine and Anderson County to extend the line of his railroad so as to intersect at Palestine the line of the International Railroad Company, and to establish and forever maintain at Palestine the general offices, machine shops and round houses of the Railroad, in consideration of the due issuance and delivery to the Railroad Company of bonds of Anderson County in the amount of $200,000.00. The amount of the bonds was finally determined on as $150,000.00. A binding contract was made between Grow and Judge Reagan for the extension as stated of the line of the Houston and Great Northern Railroad Company, and for the location and mainte-

nance forever at Palestine of the general offices, machine shops and round houses of the Railroad, in consideration of the $150,000.00 of bonds of Anderson County. Judge Reagan canvassed the County to induce the voting of the bonds. They were duly voted and issued and were delivered to Grow for his Railroad Company.

In part performance of the contract, the Houston and Great Northern Railroad Company promptly located its machine shops and round houses at Palestine, and there maintained them until the consolidation of that Company and the International Railroad Company, and since that consolidation they have been maintained at Palestine.

In 1875 the International and Great Northern Railroad Company, acting through H. M. Hoxie, its General Superintendent, further agreed to perform the previous contract of the Houston and Great Northern Railroad Company by promptly bringing the general offices of the International and Great Northern Railroad Company to Palestine, and to forever maintain at Palestine the general offices, machine shops and round houses of the International and Great Northern Railroad, in consideration, in addition to past benefits, of the construction by the people of Palestine at their

own expense under the Railroad Company's direction of all houses required for occupancy by the general officers and employees of the Company; which agreement so made by Hoxie with the people of Palestine was fully performed by them by their construction of the required houses.

The contracts made by Grow and by Hoxie were afterwards fully ratified by the directors of the respective Railroad Companies.

Following the agreement by Hoxie, the general offices of the railroad were located at Palestine and were maintained there. They were removed for a time, but were returned; and from 1888 to 1911 remained there continuously.

In 1911, the properties of the International and Great Northern Railroad Company were sold at a receiver's sale. Following the sale, the International and Great Northern **Railway** Company was chartered for the operation of the railroad. It took over the properties and proceeded with such operation.

In taking out its charter, the International and Great Northern **Railway** Company named **Houston,** Texas, as the seat of its general offices. It then became immediately apparent that the purpose was to

move these general offices from Palestine to Houston. About September 1st, 1911, the Railway Company undertook to establish the general offices of the Company at Houston, moving certain general offices to New Orleans, leaving only two general officials at Palestine. It announced its purpose to change these as well, and also to change the location from Palestine of the machine shops and round houses of the railroad. As stated, it had already moved away from Palestine, following the taking out of its charter, all of its general offices except as to two officials.

This action and threatened action on the part of the Railway Company gave Anderson County and the City of Palestine no other alternative but resort to the courts.

They thereupon instituted their suit in the State District Court of Anderson County, and obtained a preliminary injunction against the Railway Company, restraining the removal of the round houses and shops and such of the general offices as remained at Palestine and requiring the return to Palestine of those of the general offices which had been moved away.

From the granting of this injunction the Railway Company appealed. Various contentions were made by the Railway Company. It strenuously denied that

the contract referred to was ever made between Grow and Judge Reagan, or the later contract between Hoxie and the citizens of Palestine. If they were made, it contended they were merely the personal obligations of the International and Great Northern Railroad Company, which were discharged by the receivership sale of the properties of that Company.

It was sought to entirely defeat the plain effect of Article 6423—of the Act of 1889.

The appeal reached the Supreme Court of Texas. The Supreme Court of Texas held that the case as made by the petition, founded as it was on the contracts with Grow and Hoxie, above recited, and the consideration paid under those contracts to the Railroad Companies by Anderson County and the citizens of Palestine, namely, the delivery of $150,000.00 in bonds of Anderson County and the construction of the houses, above referred to, was such as to clearly subject the International and Great Northern Railroad Company to the obligation and duty imposed by the Act of 1889 to maintain its general offices, machine shops and round houses at Palestine.

It furthermore held that this duty was essentially a public one; that it rested not only upon the Inter-

national and Great Northern Railroad Company but upon the International and Great Northern Railway Company which had succeeded to the ownership of the railroad, since in its very nature it was a continuing duty which accompanied the right to operate the railroad, inhering in the franchise and subsisting with the franchise in the hands of the International and Great Northern Railway Company as the owner of the franchise.

All contention of the Railway Company as to the obligation being discharged in virtue of the sale under foreclosure of the properties of the International and Great Northern Railroad Company, was squarely overruled.

> International and Great Northern Railway Company vs. Anderson County, et al., 106 Texas 60.

Under this determination of the law, the case, on change of venue, was tried on its merits in the District Court of Cherokee County.

On that trial every issue of fact was resolved against the Railway Company. Every defense presented by it was determined against it.

The jury found that the contract between Judge Reagan for the establishment and maintenance forever at Palestine of the general offices, round houses and shops of the railroad, in consideration of the issuance and delivery of the bonds of Anderson County in the amount of $150,000.00, was made, as Judge Reagan had affirmed it was made; that the bonds of the County in the amount stated were voted and issued and were delivered to the Houston and Great Northern Railroad Company.

It found that the contract and action of Grow were afterwards ratified by the Houston and Great Northern Railroad Company.

It found that the contract between Hoxie, acting for the International and Great Northern Railroad Company, and the citizens of Palestine whereby that Company agreed to perform the contract made by Grow for the Houston and Great Northern Railroad Company, was made, and that the citizens of Palestine fully performed their part of the contract.

It found that afterwards the International and Great Northern Railroad Company fully ratified the contract made by Hoxie.

Among other defenses presented by the Railway

Company was that of a burden being imposed on interstate commerce by the maintenance of the offices and shops at Palestine. The jury found that their maintenance at Palestine would impose no such burden.

The result was a judgment decreeing that the Railway Company should forever keep and maintain the general offices, machine shops and round houses for the operation of the railroad, in the city of Palestine, where the Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company each had, for a valuable consideration received, contracted and agreed to forever keep them; and enjoining the Railway Company from maintaining elsewhere than at Palestine the general offices of certain named general officials (those named in the Texas Statutes) for the operation of the railroad, and from changing the location of the machine shops and round houses from Palestine.

On the Railway Company's appeal, the judgment was affirmed by the Court of Civil Appeals for the Sixth District of Texas.

International and Great Northern Railway Company vs. Anderson County, et al., 174 S. W. 305.

A writ of error was denied by the Supreme Court of Texas.

The Railway Company then carried the case on writ of error to this Court.

This Court affirmed the judgments of the District Court and the Court of Civil Appeals. 246 U. S. 424.

It held that the foreclosure sale of the properties of the International and Great Northern Railroad Company did not exempt the International and Great Northern Railway Company as the owner of the railroad from the duty resting upon the former company under the public law of the State. It agreed with the holding of the Supreme Court of Texas that the obligation imposed by the public law of the State upon the prior company was likewise imposed upon the succeeding company. It ruled against the Railway Company's contention in respect to any burden being imposed on interstate commerce.

The decision was a square rejection of every contention put forth by the Railway Company whereby it sought to escape the obligation imposed by the law of the State to maintain these offices and shops at Palestine.

Six years were required for the settlement of the controversy. The suit of Anderson County, et al., in the State court was instituted February 6th, 1912. The case was finally decided by this Court April 15th, 1918.

The defendants in the present bill of complaint except the Railway Company were the plaintiffs in the suit of Anderson County, et al. Appellant's Brief, pages 3 and 22.

The opinion of the Court, 246 U. S. 424, following the statement of the case (bold print ours) is as follows:

> "The railway company denies the jurisdiction of the state court and sets up that the court of the last foreclosure is the only proper forum. But a decree of foreclosure does not render the purchaser and property foreclosed sacrosanct. The Circuit Court had finished the case and had given up possession and control before this suit was brought. Shields vs. Coleman, 157 U. S. 168, 178, 179. Wabash R. R. Co. vs. Adelbert College, 208 U. S. 38, 55. Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railway was entitled to set up, in the absence of action on the part of the Court of the United States, it would not take away the power of the state court to de-

cide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat. Ricaud vs. American Metal Co., ante, 304.

"But the foreclosures did not have the supposed effect. **They no more removed all human restrictions than they excluded the authority of ordinary courts.** Suppose that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond foreclosure that the general offices were to remain forever at Palestine, it hardly would be argued, and certainly would not be argued here or in Texas with success, that the requirement could be touched by a decree. But if **the law** made that requirement, it hardly matters whether the restriction was imposed by charter or otherwise or whether the remote reason for it was a contract or a general notion of public policy. **The state courts hold that when the law on any ground fixes the place of the offices and shops the obligation is indelible by foreclosure. We see no reason why their decision should not prevail.**

"It is contended that the Office-Shops Act of 1889 does not touch the plaintiff in error by its terms and that if it be construed to do so it is unconstitutional. On the construction of the act it seems to us that there can be no doubt. It is

true that the provision requiring the general offices to be maintained at the place where the railroad had contracted to keep them is conditioned on no place being named in the charter, but of course this does not mean that articles framed under a general law can get rid of contracts that otherwise would bind, and in our opinion it is equally plain that no distinction was intended between the contract by the present road and one by its predecessor, if the office and shops 'are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made.' 'Then,' the statute says, 'said location shall not be changed.' The construction of the act by the state court is beyond criticism upon this point.

"It is said that the act so construed would infringe the constitutional rights of the parties to the mortgage of 1881, which the plaintiff in error took by foreclosure. But it will be remembered that the mortgagor under the law then in force merely had succeeded to the original contractors, freed from their unsecured debts, no doubt, but, it well might be held, not freed from the obligation in question. Also it was found by the courts below that the sale under which the mortgagor took in 1879 was not a bona fide sale, and so was not a sale that put the purchaser in a position other than that of mort-

gagor. **Apart from these considerations we should be slow to say that it was not within the power of a state legislature dealing with a corporation of the State to fix the place of its domicile and principal offices, in the absence of other facts than those appearing in this case. But furthermore when the Office-Shops Act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the Act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. Interstate Consolidated Street Ry. Co. vs. Massachusetts, 207 U. S. 79. We agree with the State courts that the condition was imposed.**

"The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden upon commerce among the States, since the road concerned has expanded and now is largely engaged in such commerce. The jury

found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon the testimony adduced the verdict must be accepted, and although no doubt there might be cases in which this Court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the State has transcended its powers. **The burden, if any, is indirect.** Some complaint is made of the form of the judgment, as purporting to be perpetual. But the word perpetual adds nothing to a requirement that the office and shops should be maintained in Palestine. **The requirement is perpetual until the law is changed.** When and how it may be changed is not before us now. Other objections are urged and other details are adverted to in the very lengthy printed arguments, besides those with which we have dealt, but we deem it unnecessary to go farther. Upon the whole case we are of opinion that the judgment below should be affirmed."

The plain purpose of the present suit, filed June 5th, 1922, as the next step in the effort to move these general offices, shops and round houses from Palestine, as has been said, is to destroy the effect of the

judgment heretofore obtained by Anderson County, et al., against the International and Great Northern Railway Company, and now subsisting in full force, requiring the maintenance at Palestine of the general offices, round houses and shops of the railroad. The prayer is that the defendants be enjoined **"from asserting their claims and maintaining that the general offices of the International and Great Northern Railway, or of any purchaser under the decree of foreclosure obtained by the plaintiff in this Court, or any further decree of this Court, operating the International and Great Northern Railway or its properties, and the shops and round houses thereof, or either of them, shall be at Palestine in Anderson County, Texas, and be forever maintained there; and that the decree forever restrain and enjoin the defendants and their successors and those they may represent from making such claims or assuming in any court to enforce the same; * * * and that it be decreed that the defendants' claims are null and forever held for naught; and that the International and Great Northern Railway and the properties which have been foreclosed on, be freed from the burden and cloud of the defendants' claims"** (Tr. pp. 29-30).

The defendants' "claims" so referred to, are shown

by the bill to proceed from and rest upon, solely, the judgment rendered in favor of Anderson County, et al., in the District Court of Cherokee County, Texas, which the bill itself pleads became final in 1918. It became final by the judgment of this Court.

The bill at great length attempts to set out why these "claims" of the defendants are unfounded. In other words it attempts to point out why the judgment rendered in favor of Anderson County, et al., was, as it says, improperly rendered. It sets up every defense which was set up by the Railway Company in that suit. Its obvious attempt is to have relitigated in this suit every question which was litigated in that suit.

The plainly disclosed purpose of the present suit is, therefore, to destroy the effect of that judgment and to relieve the International and Great Northern Railway Company from its operation.

If the International and Great Northern Railway Company can by this means be relieved from the operation of that judgment, the present International-Great Northern Railroad Company will be relieved from its operation.

The present defendants, except the Railway Com-

pany, are as the bill shows and as already said, the plaintiffs in that judgment. The bill discloses that what it calls their "claims" proceed entirely from that judgment. The bill prays that they be enjoined from "assuming in any court to enforce the same." This can only mean that they are sought to be enjoined from enforcing their judgment.

The unmistakable purpose of the suit is to undo that judgment, destroy it and to prevent its enforcement.

This is nakedly the character and purpose of the present suit. It matters not what name may be given to it. If the relief for which it prays is granted, that judgment will be destroyed and in defiance of that judgment the present Railroad Company, the International-Great Northern Railroad Company, will be free to move the general offices, shops and round houses of the railroad from Palestine.

As long as the defendants are left unrestrained in the enforcement of that judgment, the offices, shops and round houses can not be so moved.

It is a subsisting judgment therefore of a State court which the present suit touches, and which, by

restraining its enforcement, it attempts to undo and destroy.

Appellant took its mortgage in the year 1911. Appellant's Brief, 24. This was shortly after the chartering of the International & Great Northern Railway Company, formerly the International & Great Northern **Railroad** Company.

Appellant has never been other than a naked mortgagee out of possession.

The Act of 1889, expressed in Articles 6423-5 of the Texas Statutes set out in appellant's brief, was then in force, as it is now. Appellant acquired its mortgage subject to that law. As a valid public law, it imposed upon the Railway Company and every other Company succeeding to the property, a public duty as to the place of maintenance of the general offices, shops and round houses of the railroad. Such was the holding of this Court. As this Court said in its opinion, the requirement that they be maintained at Palestine "is perpetual until the law is changed." No mortgaging of the property could affect this duty imposed by law. Hence, a mortgagee can assert no rights with respect to it.

It was not pretended in the bill that the judg-

ment in favor of Anderson County, et al., which is but declaratory of the public law of the State, had in any degree impaired or would impair the security under appellant's mortgage.

Since the filing of the present bill all of the property and assets of the railroad have been sold and delivered under the foreclosure proceeding. Following the foreclosure sale they were turned over to the International-Great Northern Railroad, a slightly changed name from that of the former Company; and with them it is in full operation as a public carrier. Appellant's Brief, pages 21-2; (Tr. p. 60).

It thus appears that the judgment in favor of Anderson County, et al., to annul which is the purpose of the present suit as one alleged to be ancillary to the foreclosure proceeding, has in nowise interrupted or interfered with the full and effective exercise of the court's jurisdiction in that proceeding.

The statement in appellant's brief, page 23, that at the time of the institution of the suit of Anderson County, et al., which was in the year 1912, as stated on page 22, the properties of the International & Great Northern Railway Company were in the possession of the Federal District Court for the Southern District of Texas through its receivers, is erroneous.

The foreclosure bill was not filed in that court until August 10th, 1914. Appellant's Brief, pages 2 and 23. The further statement appearing at pages 23-4, that during the receivership in the foreclosure proceeding no effort was made to enforce the judgment in favor of Anderson County, et al., is likewise inaccurate. On the filing in 1912 of the suit of Anderson County, et al., as shown in the opinions referred to and in this bill, an injunction was issued requiring that these offices, shops and round houses be maintained at Palestine. That injunction, afterwards made permanent by final judgment, has been in force constantly since and is now; and unremitting effort has been made by Anderson County, et al., to have it observed by those in charge of this railroad.

In answer to the contentions of the appellant, we submit the following propositions.

I.

The suit having been brought by appellant solely in virtue of its mortgage; and it appearing from its amendment to its bill that the mortgage had been duly foreclosed, the sale of all the railroad property thereunder duly made and confirmed, and the property duly delivered to the purchasers and now be-

ing owned by the International-Great Northern Railroad Company with which it is operating the railroad, appellant has no further possible interest in the maintenance of the suit and the appeal is accordingly entitled to be dismissed.

II.

The bill discloses that the suit is not one ancillary to the foreclosure proceeding. And since the bill further disclosed that all the defendants were residents and inhabitants of the Eastern District of Texas, the court was without jurisdiction and the bill was properly dismissed.

ARGUMENT.

We quote merely one paragraph of the amendment to the bill as showing that due foreclosure has been had of the appellant's mortgage; that pursuant to the foreclosure a sale of all the railroad property has been made and duly confirmed; that the property was duly delivered to the purchasers under the foreclosure sale; and that since November 30th, 1922, it has been owned by the International-Great Northern Railroad Company, with which, since that time, that Company has been and is now operating

the railroad—all showing that the appellant's interest in the suit, if it had any interest in the maintenance of such a suit, is at an end.

In the amendment to the bill this is said:

"The Solicitors for the Complainant, after the filing of this bill, made one demand on Lock McDaniel, appointed in the decree Special Master to sell the property and all conditions, advertisements and requirements being complied with, he sold the same at Houston, Texas, at public outcry, to Earle Bailie and Maurice T. Moore for $5,000,000.00 the foreclosed mortgage debt then amounting to over $17,000,000.00 the sale being subject to a First Mortgage and the various obligations of the property and Receivership, as in the decree set out; and Messrs. Bailie and Moore assigned their bid to the International-Great Northern Railroad Company (hereinafter designated as the 'I.-G. N. R. R.') and on August 10th, 1922, this Court affirmed the sale and directed the deed to be made to the I.-G. N. R. R. and the property turned over to it, as in the Order of Confirmation set out; and thereafter, on or about November 25th, 1922, the deed in the form prescribed having been executed, was delivered, and at the end of Novemebr 30th, 1922, the whole railroad and all the assets and properties of the sold out

railway and of the Receiver, or held by them, were turned over to the I.-G. N. R. R. and it then went into action as a public carrier.

"In the decree of confirmation of the sale it was ordered," etc. (Tr. p. 48).

In Texas, a mortgage or deed of trust is not a conveyance. It confers no estate in the property mortgaged. It merely creates a lien upon the property. It is but incident to and security for the debt. The title to the property remains with the mortgagor and with it the right of possession. The payment of the debt extinguishes the mortgage without even a release from the mortgagee. And, of course, a foreclosure of the mortgage equally extinguishes it.

The Supreme Court of Texas, in Willis vs. Moore, 59 Texas, at page 635, said:

> "In this state it has been held, from an early day, that a mortgage is but a security for a debt; that the title to property mortgaged remains in the mortgagor, and with it the right of possession, which is one of the ordinary incidents of title."

In Soell vs. Hadden, 85 Texas, at pages 188-9, it said:

> "The doctrine that the legal title vests in the mortgagee after breach of its condition does not obtain in this State; not even as to personal property. A mortgage both as to real and personal estate is treated as a mere security for the debt."

In Perkins vs. Stearne, 23 Texas, at page 563, this is held:

> "The mortgage is treated in equity as so completely incidental to the debt which it is intended to secure that it is held that the payment of the debt extinguishes the mortgage, and that without any release from the mortgagee. Duty vs. Graham, 12 Texas, 427."

With this the law and the fact being that the appellant's mortgage has been fully foreclosed, it is difficult to perceive how it has any possible further interest in this suit, even if it be assumed that prior to the foreclosure it was possessed of such rights as entitle it to maintain the suit.

Appellant's interest in the railroad is at an end. With its interest ended, any possible right to relief in this suit ceases. Hutton vs. Metropolitan Elevated Railway Company, 46 New York Supp. 169.

For a suit to be ancillary it must in some true sense be in aid of the original cause—necessary to the effective exercise of the court's jurisdiction in that cause. It is but incident to that jurisdiction. Necessarily its subject matter must be such that the court may rightfully deal with it in virtue of its original jurisdiction. If it has to do with matters wholly foreign to the main cause, with which that cause is not and cannot be concerned, involving no character of claim to property affected by the court's decrees, and which offer no obstruction or interference with the full exercise of the court's powers in that cause, it is itself an original, not an ancillary, suit.

If it has to do, as is true of this bill, with a judgment—seeking to enjoin its enforcement—a judgment, too, which does not touch or run against any property and is only declaratory of a public duty of the defendant under the law of the State, a duty which the court itself must recognize in its administration of the defendant's property through its receiver, it cannot be other than an original suit.

Illustration of ancillary jurisdiction is given in the opinion in Hoffman vs. McClelland, ... U. S. 68 L. Ed. 474, as follows:

"It is settled that where, in the progress of a

suit in a Federal Court, property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting, and enforcing their claims—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene pro interesse suo, or by a dependent bill. But, in either case, the proceeding is purely ancillary."

In Street's Federal Practice, Volume 2, Section 1251, this is found upon the subject:

"In truth, it appears that ancillary suits fall, in the main, into two different classes of cases. (1) The first is that in which the ancillary proceeding is plainly a mere dependency or continuation of the main suit, as in bills to enjoin suits at law, cross bills, supplemental bills, bills to execute decrees, and bills of review. In this class of cases the ancillary proceeding is brought by one who is a party to the principal suit or by some one in privity with such a party. The jurisdiction in this class of ancillary proceedings rests upon the principle that the court, having once

acquired jurisdiction of the parties and subject-matter, necessarily has the power to determine all related and subordinate matters connected with that controversy. (2) The second class of cases is that which has to do with situations where a stranger to the suit wishes to come into the suit in order to assert a lien, claim, right or title to the property or fund that is the subject of the suit. Jurisdiction here flows from the fact that the court has that property or fund in its exclusive control. If a situation is not such as to bring the case within one or the other of these classes, the proceeding cannot be sustained as an ancillary proceeding, but the party must resort to an original bill."

And in Section 1252, this:

"A suit cannot be maintained as an ancillary proceeding, if it calls for the investigation of a new case, arising upon new facts, and new parties are made. Here the remedy must be by simple original bill; and the jurisdiction of the cause must exist independent of the jurisdiction in the former or principal cause."

In Rose's Code of Federal Procedure, Volume 1, Section 19, this is said:

> "Moreover, a Federal Court's power to take cognizance of a proceeding attacking a State judgment or decree, is necessarily limited to such **as may fairly be deemed independent and original**, involving a new case and depending upon new facts, as distinguished from proceedings ancillary and incidental, such as motion for new trial or bill of review based upon irregularities or newly discovered evidence."

Barrow vs. Hunton, 99 U. S. 80, is in our opinion conclusive.

There, a suit was brought in the State court by Goodrich, praying for a decree of nullity against a judgment recovered in the same court by Hunton against Goodrich and another. Hunton removed the case to the United States Circuit Court upon the ground or diversity of citizenship. A motion to remand was denied. After various proceedings Goodrich, the plaintiff, amended his petition so as to conform with the equity practice of the United States Court, converting the petition into a bill in equity in the United States Court and praying the same relief as before.

The ground of the relief sought was that the judgment was void because there was no lawful serv-

ice of the petition and citation in the case out of which the judgment grew.

The question before the court was whether the proceeding thus made in the Federal Court was one merely supplemental or ancillary to the original suit in the State court. It was held to be such a suit and for that reason the jurisdiction of the Federal Court was denied. This was clearly proper, since the purpose of the suit was merely to revise the judgment for an irregularity in its rendition. Jurisdiction for that purpose was accordingly in the court which rendered the judgment, that is the State court.

After showing that the proceeding was but an attempt to revise the judgment because of an irregularity, the opinion proceeds (p. 83):

> **"On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in Gaines vs. Fuentes (92 U. S. 10), the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the**

> **legality and correctness of the judgments and decrees of the State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."**

Marshall vs. Holmes, 141 U. S. 589, is equally authoritative. In it the rule of Barrow vs. Hunton was applied. There, the suit was to enjoin judgments rendered in the State court because of fraud in obtaining them. It was first filed in the State court. Later, the plaintiff removed it to the Circuit Court of the United States. The question was the jurisdiction of the Circuit Court.

In speaking of the nature of such a suit, after referring to Barrow vs. Hunton, the following is quoted in the opinion from Arrowsmith vs. Gleason, 129 U. S. 86 (page 599):

> "These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an **original, independent suit for equitable relief between the parties,**—such relief being grounded upon a new state of facts," etc. (Bold print ours).

Further, in the opinion this is said (page 599, Bold print ours):

> "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, **which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction.**"

This bill does not attack the judgment of the State court rendered in favor of Anderson County, et al., as having been fraudulently obtained, but it does seek relief against it upon various other alleged equitable grounds, involving the same issues determined by that judgment.

If, as held by these authorities, a suit challenging a decree of a State court upon the ground of fraud is in its nature essentially an independent, original action, **of which the Federal Courts would not have jurisdiction if of a different character,** plainly this suit, which likewise upon alleged equitable grounds attacks a judgment of a State court, is equally independent and original.

How could it be less original than Marshall vs. Holmes?

Its purpose, its nature, as an attempt to relieve against a judgment of a court of another jurisdiction, to re-try the questions settled by that judgment, and to escape its operation with respect to this railroad in its declaration of a public duty under the State law running with the railroad and resting upon any owner, stamp it indelibly with the character of an original suit.

It cannot be disguised that the suit is altogether leveled at the Anderson County judgment as rendered by the State court. But for that judgment, there would be no suit. What the bill refers to as "the claims" of these appellees all flow from that judgment and rest upon it. This the bill plainly discloses.

The suit is simply one in equity seeking upon what are alleged as sufficient equitable grounds to take away from the plaintiffs in the Anderson County judgment the benefits of it by restraining its enforcement, exactly as was the nature of the suit in Marshall vs. Holmes.

The action in Marshall vs. Holmes was held to be independent and original. So, we submit, it must be held here of this suit.

What has the foreclosure suit to do, or the jurisdiction of the court in the foreclosure suit, with the reopening of the matters concluded by the Anderson County judgment? What possible kinship is there between such a controversy and a suit to foreclose a mortgage lien?

It introduces into the foreclosure proceeding a wholly new and independent controversy, in no sense related to that proceeding and having nothing properly to do with the exercise of the court's jurisdiction in it — a suit "arising upon new facts," between new parties, and presenting issues entirely foreign to the foreclosure action.

It would be difficult to conceive of a case which more involves interests different from and unrelated to those in a foreclosure proceeding than one which attempts the determination of whether there exist equitable grounds for restraining the enforcement of a judgment of a court of a different jurisdiction in favor of a community and citizens not parties to the foreclosure proceeding and which is only declaratory of a statutory, public duty of the defendant in the judgment.

The Anderson County judgment establishes no

rights in the property of the railroad and does not purport to.

Its enforcement has to do only with the operation of the railroad. The statutory public duty which the judgment only declares, has only to do with the operation of the railroad. The State statute merely provides as to where a railroad company subject to the statute shall maintain certain instrumentalities in the operation of its railroad. It simply declares what shall be the duty of the railroad company in that respect. It does not run against the property. It runs only against the owner of the property by defining what its duty shall be. This is equally true of the Anderson County judgment. It impresses no lien upon the property. It asserts no right to the property. It seeks nothing in respect to the property. There is nothing about its enforcement that could impair the lien of the appellant as it once existed, or that could operate to its prejudice. It is not even asserted in the bill of complaint that its operation will prejudice the lien. It has not in the least interfered with the foreclosure and the sale and delivery of the railroad property, an already accomplished fact. As the amendment to the bill pleads, the foreclosure has been had; the property has been sold; and

the property has been delivered to the present railroad company—all without any interference whatever by reason of the judgment.

The judgment simply declares what the law of the State provides shall be the duty of the owner of this railroad in respect to the place of maintenance of these offices, shops and round houses. It declares that unequivocally, just as the State law is unequivocal. But that is all. It has effect as a judicial finding that the then owner of the railroad was subject to that law. Under the decision of this Court, on the appeal of that case, 246 U. S. 424, as under the decision of the Supreme Court of Texas, 106 Texas 60, any owner of the property is subject to that law so long as the law stands unchanged. The judgment makes no adjudication in respect to the property. As stated, it deals, as does the State law, only with the **place** where certain operations of the railroad shall be carried on, and defines the duty of the owner of the railroad in that respect.

The court's control of the property in the foreclosure proceeding could not be disturbed by its operation; it never was disturbed; and it will not be disturbed in the future as respects any jurisdiction it may continue to possess in that proceeding.

That proceeding has nothing whatever to do with determining where these offices, shops and round houses shall be maintained. There has never been any such issue in that proceeding, and the determination of such a question is wholly foreign to it.

By a competent State court judgment declaratory of a valid State law, it has been determined. If that judgment is to be interfered with; if the questions which it concluded are all to be now reopened and retried; if there is to be no end to the controversy and under the guise and at the behest of this mere naked mortgagee, the holder of a foreclosed and defunct mortgage, it is to drag its weary way again through the courts of the land, it must be by an original and independent proceeding.

We submit that the judgment cannot be rightfully disturbed in virtue of the jurisdiction obtaining only for the foreclosure of a lien.

It is the duty of Federal Courts through their receivers to observe valid State laws affecting the operation of railroads in their custody. It is equally the duty of those courts to observe valid judgments declaratory of such laws. In our opinion it is idle to say that the operation of such a judgment could

amount to an invasion of or interference with the jurisdiction of a court having possession of the railroad property in a foreclosure action. The observance of a valid State law governing the operation of the railroad and of a judgment declaratory of that law being consistent with the court's jurisdiction could not invade its jurisdiction. Both the court's jurisdiction in the foreclosure action and the judgment could operate, as they have operated, wholly without any interference. The foreclosure proceeding, therefore, did not and could not draw to it the question of whether the judgment is entitled to be relieved against as is sought in this suit. Buck vs. Colbath, 3 Wallace, 334.

The authorities cited by the appellant have no application. Julian vs. Central Trust Company, 193 U. S. 93, is illustrative of them. In that case, a suit ancillary to the foreclosure proceeding was held maintainable to protect the purchaser under the foreclosure against levies and sales of the property—to protect, in other words, the title to the property as conferred by the court. There is no such situation here.

While not strictly relevant here, we deem it not inappropriate to say that it is of no consequence that this mortgagee was not included as a defendant in the Anderson County suit. If the duty rested upon the railway company to maintain these offices, shops and round houses at Palestine as the judgment in that suit affirms, a mortgaging of the property could not affect the duty. Hence, a mortgagee could not have been either a necessary or proper party to that suit.

Besides, we think it clear that while not strictly a proceeding in rem, that suit was in the nature of an action in rem, and the judgment in it bound everybody. It could hardly be less in the nature of an action in rem than a proceeding for the laying out of a county road, or for the establishment of disputed boundary lines between adjoining towns, judgments in which character of suits are generally held conclusive upon all persons. Black on Judgments, Volume 2, 2nd Edition, Section 812. Mill Creek Township vs. Reed, 29 Pa. 195; Pitman vs. Town of Albany, 34 N. H. 577.

We respectfully pray that the appeal be dismissed; and if it be sustained, that the judgment below be affirmed.

Respectfully submitted,

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APPENDIX

Article 6435, Civil Statutes of Texas.

CHANGE OF LOCATION OF GENERAL OFFICES, ETC., PROHIBITED; APPLICATION TO RECEIVERS AND PURCHASERS.—No railroad corporation shall have the right in the future to change the location of its general offices, machine shops or round houses, save with the consent and approval of the Railroad Commission of Texas, and this shall apply also to receivers and to purchasers of the franchises and properties of railroad companies and to new corporations formed by such purchasers or their assigns, provided, however, that the Railroad Commission of Texas shall not consent to, or approve of, any removal or change of location, in conflict with the restrictions of Article 6423 of the Revised Civil Statutes of Texas of 1911; and, provided further, that no consent or approval of the Railroad Commission of Texas shall be required before the return of general offices, machine shops or round houses to previous locations when ordered or required under judgments in suits now pending in trial or appellate courts.

CENTRAL UNION TRUST COMPANY OF NEW YORK *v.* ANDERSON COUNTY, TEXAS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 178. Argued January 16, 1925.—Decided April 13, 1925.

1. An ancillary suit may be maintained by the plaintiff in the principal suit against strangers to the record to determine a controversy related to property in the custody of the court and which, in justice to the parties before the court, ought to be determined in the principal suit. P. 96.
2. A bill brought by a trustee for railway bond holders against the railway, a county, a city, state officials and citizens to enjoin further assertion of claims that the general offices, shops, and round houses of the railway must be kept at the city; *held*, within the jurisdiction of the District Court as ancillary to and dependent on a pending suit brought by the trustee against the railway to foreclose the mortgage. *Id.*

Reversed.

APPEAL from a decree of the District Court dismissing a bill for want of jurisdiction.

Mr. S. B. Dabney and *Mr. H. M. Garwood*, for appellant, submitted.

Mr. Nelson Phillips, with whom *Messrs. Murphy W. Townsend*, *A. G. Greenwood*, and *A. M. Barton* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The complaint in this case was filed as ancillary to and dependent on a suit for the foreclosure of a mortgage on railroad properties. On the motion of defendants, the district court held that it had no jurisdiction and dismissed the cause. This is an appeal from that decree. The question of jurisdiction alone is certified. Judicial Code, § 238.

In 1911, the International & Great Northern Railway Company was organized, and acquired under mortgage foreclosure sale all the property of the International & Great Northern Railroad Company. At the time of the purchase, the railway company made a mortgage of all its properties to appellant. The latter brought suit in equity against the railway company to foreclose the mortgage, and, August 10, 1914, the court appointed receivers who took possession of and operated the property. May 17, 1915, the court entered a decree of foreclosure, providing that, if the company failed to pay the mortgage debt, $12,908,461.06, with interest, the property should be sold. Pursuant to the decree, all the property, consisting of 1106 miles of railroad, all money, claims and assets in the hands of the receiver, was sold for $5,000,000, subject to the lien of a first mortgage and other existing obligations, as well as such obligations as the court thereafter should fix. By decree of August 10, 1922, the court confirmed the sale and directed the execution of a deed to the International-Great Northern Railroad Company.

June 5, 1922, before the sale, appellant filed this complaint. The defendants were the railway company, Anderson County, Texas, the county judge, the clerk of the county court, the city of Palestine in that county, its mayor, and certain of its citizens as representatives of all similarly situated. The complaint alleges as follows. The defendants, except the railway company, were asserting that in 1872 and 1875 contracts were made with the predecessors of the railway company which, taken with an act of the legislature of Texas of 1889, amended in 1899, operated to require the original contracting companies and all successors in title forever to maintain the general offices, shops and roundhouses at Palestine. In 1912, the defendants had sued the railway company in the state district court and obtained a decree requiring it forever to keep its general offices, shops and roundhouses at Pales-

tine.* Although, at the time of bringing suit, defendants had knowledge of the existence of the mortgage, they failed to make plaintiff a party to the suit. They insist that the decree is *res adjudicata* and binding against plaintiff and any purchaser under the foreclosure sale; and they threaten, if it is not observed by the purchaser, to enforce the decree with penalties. It is impossible to maintain the general offices, shops and roundhouses at Palestine without great loss and injury to and burden on the railroad property. The claims of defendants, if maintained, will cause a net loss in operating the railroad of not less than $500,000 per year, and thereby diminish the value of the property by not less than $3,000,000, and constitute a cloud and burden on the title and value of the property. The alleged contracts of 1872 and 1875 were never made; and if made, never became binding on the successors of the corporations with whom they were made, and are not binding upon plaintiff or any purchaser under the foreclosure decree. Defendants, without equity or right, are clouding the title and burdening the property to the great injury of plaintiff, its trust, and any purchaser of the property. The suit is brought in aid of the principal cause and the decree of foreclosure and for the benefit of the plaintiff and any purchaser under the decree, and for the purpose of determining whether the claims of Anderson County, Palestine and its citizens are valid in law or equity. By appropriate provisions in the decree of May 17, 1915, foreclosing the mortgage and authorizing the sale, and in the decree of August 10, 1922, confirming the sale and directing conveyance to the purchaser, the court retained jurisdiction to determine any

* The act above referred to is now Articles 6423, 6424 and 6425, Revised Statutes of Texas. The substance of the statutory provisions and litigation is disclosed by the decisions in the case, which are reported, repectively, in 150 S. W. 239; 106 Texas 60; 174 S. W. 305; 246 U. S. 424.

questions affecting the title to the property or that are germane to the purpose or substance of this suit. Plaintiff prays that the court forever enjoin defendants from asserting, or in any court attempting to enforce, their claims that such offices, shops and roundhouses shall be kept at Palestine, and that it decree the railroad property to be free from the burden and cloud of such claims.

If the complaint discloses a controversy that is ancillary to and dependent on the foreclosure suit, the district court had jurisdiction. The rule permitting third persons to come into suits in federal courts to enforce their claims in respect of property there impounded is stated in *Hoffman* v. *McClelland*, 264 U. S. 552, 558: "It is settled that where in the progress of a suit in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceeding is purely ancillary." Ancillary suits are not limited to those initiated by persons who desire to come in and have their rights determined. Such a suit may be maintained by the plaintiff in the principal suit against strangers to the record to determine a controversy having relation to the property in the custody of the court and which, in justice to the parties before the court, ought to be determined in the principal suit. See *Compton* v. *Jesup*, 68 Fed. 263, 284. Street, Fed. Eq. Pr. § 1248.

The provision of the decree of May 17, 1915, retaining jurisdiction, extended to all questions not determined and reserved the right to resell the property in case the pur-

chaser should fail to make any payment on account of purchase price within a specified time after the order requiring it. The decree of August 10, 1922, confirming the sale, retained jurisdiction over the property with reference to all claims against the railway company and to enforce payment of any judgment therefor out of the property sold. It reserved all questions relating "to suits now pending in this Court in this cause, or affecting the property above dealt with . . . for further hearing and determination . . ." In view of the reservations in these decrees, the sale and delivery of the railroad properties to the purchaser did not deprive the court of jurisdiction over the property or terminate plaintiff's right to carry on this suit. *Wabash Railroad* v. *Adelbert College,* 208 U. S. 38, 54; *Julian* v. *Central Trust Co.,* 193 U. S. 93, 111; *Smith* v. *Missouri Pacific R. Co.,* 266 Fed. 653.

Taking the allegations of the complaint to be true, the maintenance of the general offices, shops and roundhouses at Palestine burdens and restricts operation, requires great and unnecessary expenditures and correspondingly diminishes the value of the railroad. If, as asserted in the complaint, the claims and insistence of the defendants are groundless, plaintiff had a right to have the property sold free from such burdens and restrictions. The controversy has direct relation to the operation, use and value of the railroad property, and must be held to be ancillary to and dependent on the foreclosure suit. The district court had jurisdiction and should have heard and determined the merits.

Decree reversed.